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No. 07-980

IN THE
Supreme Court of the United States

MICHAEL FOGARTY AND TERRIE FRITZ,
Petitioners,

v.

ALFRED MILTON EVANS, SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC., RUSTLING WINDS, INC., MORNING STAR MENTAL HEALTH SERVICES, INC., DIVERSIFIED FAMILY SERVICES, INC., SERENITY SPRINGS MENTAL HEALTH SERVICES, L.L.C., JCH, INC., NEAL THRIFT, NANCY GRAVES-THRIFT, JOHN MAJORS, CYNTHIA MAJORS, CHARLES PARKHURST, MARY PARKHURST, LEROY WHEELER, AND JOEL HOLCOMB,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are officials with responsibilities for administering the Oklahoma Medicaid program who were sued by respondent Medicaid providers and are now facing millions of dollars in personal liability, and a third trial, as a result of the Tenth Circuit's reinstatement of a jury verdict that was set aside by the district court as against the weight of the evidence.

The questions presented are:

1. Whether the Tenth Circuit was correct to hold, in conflict with three other courts of appeal, that a qualified immunity defense is waived for all purposes if not raised in the pretrial order?

2. Whether the Tenth Circuit was correct to reverse the district court's grant of a new trial by applying a "more stringent scrutiny" than the abuse of discretion standard used by five other Circuits?

3. Whether the Tenth Circuit erred in reinstating a punitive damages award even though it remitted or remanded the bulk of compensatory damages as being "speculative, remote, imaginary, or impossible of ascertainment" and "so excessive as to shock the judicial conscience"?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the court of appeals were Petitioners, Respondents, and Dana Brown, who was a codefendant/appellee/cross-appellant with Petitioners.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 14

I. The Tenth Circuit's Opinion Creates A Split Among The Circuits On Whether Qualified Immunity Is Waived If Not Included In a Pretrial Order. 14

II. The Tenth Circuit's Opinion Deepens A Split Among The Courts Of Appeals On The Standard Of Review Of A District Court's Grant Of A Motion For A New Trial. 21

A. Five Circuits Specifically Apply Abuse Of Discretion To Review New Trial Grants. 23

B. The Tenth Circuit Is One Of Four That Apply A More Searching Inquiry. 25

C. Under This Court's Decision In *Gasperini*, The Tenth Circuit Should Have Upheld The District Court's Grant Of A New Trial As Within Its Discretion. 27

III. The Tenth Circuit Erred In Reinstating The Punitive Damages While Remitting Or Remanding Most Of The Compensatory Damages Award.....28

CONCLUSION 31

APPENDIX TABLE OF CONTENTS

The Court of Appeals' Judgment,
Evans v. *Fogarty* (10th Cir. Aug. 22, 2007) 1a

Order Denying Rehearing En Banc,
Evans v. *Fogarty* (10th Cir. Oct. 23, 2007) 54a

The District Court's 2005 Order Granting JMOL,
Evans v. *Fogarty* (W.D. Okla. Feb. 23, 2005) 56a

The District Court's 2003 New Trial Order,
Evans v. *Fogarty* (W.D. Okla. Aug. 25, 2003) 98a

Order Denying Motion to Dismiss
Evans v. *Fogarty* (W.D. Okla. Aug. 14, 2001) ... 109a

TABLE OF AUTHORITIES

CASES

Page(s)

Alexander v. *Fulton County, Ga.*,
207 F.3d 1303 (11th Cir. 2000) 19

Amorgianos v. *Nat'l R.R. Passenger Corp.*,
303 F.3d 256 (2d Cir. 2002) 24

Apostol v. *Gallion*,
870 F.2d 1335 (7th Cir. 1989) 18

Behrens v. *Pelletier*, 516 U.S. 299 (1996) 18

Bd. of the County Comm'rs v. *Brown*,
520 U.S. 397 (1997) 7

BMW of N. Am., Inc. v. *Gore*,
517 U.S. 559 (1996) 29

Butcher v. *United States*,
368 F.3d 1290 (11th Cir. 2004) 27

Byrd v. *Blue Ridge Rural Elec. Coop.*,
356 U.S. 525 (1958) 21

Calderon v. *Witvoet*,
999 F.2d 1101 (7th Cir. 1993) 15, 20

Carey v. *Phiphus*, 435 U.S. 247 (1978) 29

Cline v. *Wal-Mart Stores*,
144 F.3d 294 (4th Cir. 1998) 24

Cross v. *N.Y. City Transit Auth.*,
417 F.3d 241 (2d Cir. 2005) 24

Czajka v. *Black*,
901 F.2d 1484 (8th Cir. 1990) 24

Dayton Hudson Corp. v. *American Mut. Liability Ins. Co.*, 621 P.2d 1155 (Okla. 1980) 29

Denhof v. *City of Grand Rapids*,
494 F.3d 534 (6th Cir. 2007) 25

Duncan v. *Duncan*,
377 F.2d 49 (6th Cir. 1967) 25

Evans v. *Fogarty*,
123 F. App'x 863 (10th Cir. Jan. 26, 2005) 8, 9

Farrior v. *Waterford Bd. of Educ.*, 277 F.3d 633
(2d Cir. 2002) 24

Gasperini v. *Ctr. for Humanities*,
518 U.S. 415 (1996) 21, 22, 27

Gomez v. *Toledo*, 446 U.S. 635 (1980) 20

Guzman-Rivera v. *Rivera-Cruz*,
8 F.3d 664 (1st Cir. 1996) 16, 17, 20

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 20

Hutchinson v. *Stuckey*,
952 F.2d 1418 (D.C. Cir. 1992) 12, 25, 26

Kelly v. *City of Oakland*,
198 F.3d 779 (9th Cir. 1999) 19

Kennedy v. *City of Cleveland*,
797 F.2d 297 (6th Cir. 1986) 19

Langevine v. *District of Columbia*,
106 F.3d 1018 (D.C. Cir. 1997) 26

Lind v. *Schenley Indus., Inc.*,
278 F.2d 79 (3d Cir. 1960) 22

Littlewind v. *Rayl*, 33 F.3d 985 (8th Cir. 1994) 19

Magnum Foods, Inc. v. *Continental Casualty Co.*,
36 F.3d 1491 (10th Cir. 1994) 29

McClain v. *Owens-Corning Fiberglas Corp.*, 139
F.3d 1124 (7th Cir. 1998) 23

Medcom Holding Co. v. *Baxter Travenol Lab.*,
106 F.3d 1388 (7th Cir. 1997) 22, 23

Memphis Cmty. Sch. Dist. v. *Stachura*,
477 U.S. 299 (1986) 29

Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 18, 20, 21

Monell v. *New York City Dept. of Social Servs.*,
436 U.S. 658 (1978) 7

Nagy v. *Riblet Prods. Corp.*,
79 F.3d 572 (7th Cir. 1996) 16

O'Connor v. *Huard*, 117 F.3d 12 (1st Cir. 1997) 17

Pierce v. *Smith*, 117 F.3d 866 (5th Cir. 1997) 18

Radwan v. *Carteret Bd. of Educ.*,
62 F. App'x 34 (3d Cir. 2003) 22

Rangolan v. *County of Nassau*,
370 F.3d 239 (2d Cir. 2004) 24

Spann v. *Rainey*, 987 F.2d 1110 (5th Cir. 1993) .. 17, 18, 20

Stamathis v. *Flying J, Inc.*,
389 F.3d 429 (4th Cir. 2004) 22

United States v. *Flores*,
981 F.2d 231 (5th Cir. 1993) 24

Wulf v. *City of Wichita*,
883 F.2d 842 (10th Cir. 1989) 8

STATUTES

Okla. Stat. tit. 51, § 162 29

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit. The decision below subjects state officials attempting to control spiraling Medicaid costs to millions of dollars in personal liability and, unless corrected, threatens the ability of public servants like Petitioners to administer state programs effectively and without fear of personal retribution.

The Tenth Circuit held that state officials with responsibilities for administering the Oklahoma Medicaid program waived their qualified immunity from suit by failing to include the defense in the pretrial order, even though they had already moved to dismiss the case on qualified immunity grounds and asserted it as an affirmative defense in their answer.

The Tenth Circuit then applied "more stringent scrutiny," rather than the ordinary abuse of discretion standard, to reverse the district court's grant of a new trial, thereby reinstating a jury verdict against petitioners that the trial court had set aside as against the weight of the evidence.

The Tenth Circuit's opinion conflicts with the decisions of other courts of appeals, and is in tension with decisions of this Court, in several respects. *First*, the court of appeals' decision holding Petitioners' qualified immunity defense waived because it was not included in the pretrial order conflicts with at least three other courts of appeals, which have held that the defense is not waived in the circumstances here. The Tenth Circuit's decision is

particularly egregious as it fails to take into account the longstanding rule that while an order denying qualified immunity may be appealed immediately, the defense is not waived if no appeal is taken.

Second, the Tenth Circuit's decision to apply "more stringent scrutiny" to review the district court's grant of a new trial deepens an existing split among the courts of appeal as to the appropriate standard of review when a district court determines that a jury's verdict is against the weight of the evidence.

Finally, both of these errors are compounded by the court's reinstatement of the jury's award of nearly $1 million in punitive damages against petitioners personally—which under Oklahoma law will not be covered by insurance, nor indemnified by the State—even as it remitted or remanded the bulk of compensatory damages as being "speculative, remote, imaginary, or impossible of ascertainment" and "so excessive as to shock the judicial conscience."

Each of these aspects of the decision below disregards the difficulties faced by public servants tasked with administering costly and complex government programs, and together they call for review and correction by this Court.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-53a, and the judgment of the district court, App., *infra*, 56a-97a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2007. App., *infra*, 1a. A petition for rehearing en banc was denied on Oct. 23, 2007. App., *infra*, 54a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners were sued in their personal capacity under 42 U.S.C. § 1983. That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress * * *.

STATEMENT OF THE CASE

Petitioner Mike Fogarty is the Chief Executive Officer of the Oklahoma Health Care Authority ("OHCA") which oversees Oklahoma's Medicaid program, and Petitioner Terrie Fritz is the Director of Behavioral Health for OHCA. App., *infra*, 3a. Respondents are individuals and private corporations that provide behavioral and mental

health services and have elected to participate in Oklahoma's Medicaid program. *Id.*

1. Oklahoma's Medicaid Cost Savings Measures.

In the 1990s, Oklahoma experienced a sharp increase in the cost of mental health services paid to private providers through its Medicaid program. App., *infra*, 76a. Between 1994 and 1997, Medicaid funds paid to these providers rose 700%, from $3.1 million to $22.1 million. *Id.* at 4a. In an effort to stem spiraling costs and prevent fraud, mismanagement, and substandard services, the state established "a system of prior review and authorization for mental health services." *Id.* at 76a.

OHCA contracted with the Oklahoma Foundation for Medical Quality ("OFMQ") to perform the prior approvals according to medical necessity standards. *Id.* "An approved provider would prepare a proposed treatment plan for each of its patients or clients and could submit that to OFMQ. All private providers in Oklahoma were required to get prior authorization from OFMQ as a precondition to reimbursement for services rendered." *Id.*

Respondents, as private mental health services providers, were subject to the prior authorization and review procedures. In 1998, Respondents and other private mental health providers formed an association to lobby the state legislature on their behalf. *Id.* at 4a, 58a. The association, along with certain individual Respondents, was successful in some of these lobbying efforts, but was unsuccessful in others. *Id.* at 4a-6a.

2. The litigation. This case arises from two suits filed by Respondents under 42 U.S.C. § 1983, alleging various causes of action against Petitioners in their individual and official capacities, along with members of the OHCA board of directors in their official capacities, and OFMQ. *Id.* at 5a n.3, 6a. Among their other claims, Respondents alleged that Petitioners "retaliated against them in various ways because of their lobbying or political activities." *Id.* at 58a.

In their answers to both cases, Petitioners asserted as an affirmative defense that they are entitled to qualified immunity. Petitioners then moved to dismiss both cases on qualified immunity grounds. *Id.* at 16a-17a n.9. The court denied the motions on the ground that Respondents alleged a violation of a constitutional right against retaliation for their speech about Oklahoma's Medicaid program, and that the right was clearly established. *Id.* at 118a. Petitioners did not immediately appeal that decision.

The district courts in both cases then dismissed "all claims other than plaintiffs' First Amendment retaliation claim." *Id.* at 7a n.6; 57a n.1. The cases were consolidated and tried on that claim alone. *Id.* at 7a.

3. The first trial and the district court's grant of a new trial. The first trial in this case was held in April, 2003. *Id.* at 58a. The crux of respondents' evidence in support of their claim of retaliation for their lobbying activities was that, on average, they were approved for several dollars less per "unit of service" than other providers. *Id.* at 21a. That evidence did not analyze the different rates at

which services were billed, compare the amount approved to what had been requested, or examine reimbursement levels prior to the lobbying efforts that respondents contended had led to retaliation. The respondents sought damages equal to "lost revenue" had their "units of service" been paid at a higher rate.

The jury returned a verdict holding Petitioners personally liable for compensatory damages totaling $24,000,000 to the corporate plaintiffs and $9,095,000 to the individual plaintiffs. *Id.* at 8a. The jury awarded an additional $1,350,000 in punitive damages. *Id.* at 98a-99a. Of the compensatory damages award, $19,857,000 was awarded against Mr. Fogarty and $8,883,500 against Ms. Fritz.[1] *Id.* at 8a. Punitive damages were assessed at $450,000 against each Petitioner. *Id.*

The district court granted Petitioners' motion for a new trial. The court concluded "that the verdict returned by the jury in this case is unsupportable under the evidence and applicable law and must be set aside in its entirety." *Id.* at 99a. The court stated that it was "reluctant to disturb the jury's determination," but found that "the jury's verdict and determination is in error, is not supported by the evidence, and must be overturned." *Id.* at 100a.

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[1] The remainder was awarded against Dana Brown, OHCA's legislative liaison, who was a defendant along with Petitioners throughout this litigation until the court of appeals concluded that "it was error for the district court to deny JMOL to Brown as to all plaintiffs following the first trial." App., *infra*, 38a.

The court held that "much of the evidence offered to establish retaliatory activity by defendants Fogarty, Fritz and Brown bordered on pure speculation and, in some instances, was based on little more than proof that the particular defendant was a supervisor of some activity at OHCA." *Id.* at 100a-101a. The court correctly noted that "[a]n individual defendant's liability in a § 1983 action may not be based on the doctrine of respondeat superior, but must be based on that individual's personal participation in the wrongful activity." *Id.* at 101a; *see also Bd. of the County Comm'rs* v. *Brown*, 520 U.S. 397, 403 (1997) (Section 1983 "'cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor,'" quoting *Monell* v. *New York City Dept. of Social Servs.*, 436 U.S. 658, 689 (1978)).

The court also found that the evidence was insufficient to support the jury's $33 million damages award. The court held that "[t]he only basis" that the jury could have relied on was to accept "the impact of the claimed disparity in reimbursement rates" between plaintiffs and other providers. App., *infra*, 101a. Because Respondents "made no effort to quantify the economic losses of each corporate plaintiff," the court held that "[t]he amount of damages awarded to each particular corporate plaintiff is thus without sufficient support in the evidence." *Id.* at 102a. The court also held that the evidence did not support the verdict because it was based on the corporate plaintiffs' gross revenues, rather than their lost profits. *Id.* at 104a. Finally, the court held that the awards to individual

plaintiffs for emotional distress, which ranged from $295,000 to $3 million, were not supported by substantial evidence, shocked the judicial conscience, and therefore were "plainly excessive." *Id.* at 104a-105a (citing *Wulf* v. *City of Wichita*, 883 F.2d 842, 874-75 (10th Cir. 1989)).

The court ordered a new trial "with considerable reluctance," noting that "[a]ny jury verdict is entitled to substantial deference from the Court and should be set aside only where the need to do so is clear." The court nevertheless held that "a new trial is necessary and appropriate under the circumstances of this case." *Id.* at 107a.

4. The second trial and the district court's grant of judgment as a matter of law. Following the district court's grant of a new trial, Petitioners sought leave to file a motion for summary judgment on qualified immunity grounds. The district court denied the motion on the grounds that "the pretrial order entered in the case did not preserve or assert the defense of qualified immunity." App., *infra*, 10a.

On appeal, the Tenth Circuit held that it lacked appellate jurisdiction. *Id.* at 11a; *Evans* v. *Fogarty*, 123 F. App'x 863, 865 (10th Cir. Jan. 26, 2005) (unpublished). The court stated that the district court's order "did not address any qualified immunity issue. It was simply a pretrial order denying defendants' request to file a motion." 123 F. App'x at 865. The court stated that "[d]efendants will have a full opportunity to address any properly preserved qualified immunity issue on appeal from the adverse jury verdict reached in, and any adverse

post-trial rulings with respect to, the second trial." *Id.*

In the second trial, the jury found in favor of Respondents and against Mr. Fogarty, awarding a total of $1,020,000 in damages to individual plaintiffs and $14,295,000 to the corporate plaintiffs. App., *infra*, 58a. The jury held in favor of Ms. Fritz against all but two plaintiffs, who were awarded a total of $575,000. *See id.* at 59a. The jury also awarded $300,000 in punitive damages against Mr. Fogarty and $7,500 against Ms. Fritz. *Id.*

On Petitioners' motions for judgment as a matter of law, the court held that the "critical issue" was whether there was sufficient evidence "from which the jury could have reasonably concluded that Fogarty took adverse action against" Respondents. *Id.* at 64a. The court held that showing that a defendant head of an agency who had "serious disputes or disagreements with a plaintiff," combined with "evidence that the plaintiff was treated unfavorably by the agency" was "not enough" to support an inference that the defendant caused the plaintiff's harm. *Id.* at 65a. "To hold otherwise would be inconsistent with the principle that a supervisor is not liable for the actions of subordinates merely because of his position." *Id.* at 65a-66a.

With the exception of certain "alleged threatening and defamatory statements" by Mr. Fogarty, the district court found that "the evidence simply was insufficient to support an inference that Fogarty took adverse or retaliatory action against the [individual] plaintiffs." *Id.* at 70a, 72a. The court noted that "[m]uch of plaintiffs' evidence

related to complaints with the Medicaid system (or provider reimbursement system) generally." *Id.* at 67a. The court held that while Oklahoma's "efforts to control the growth in the cost of mental health services" resulted in burdens on the plaintiffs, "[t]here was not . . . evidence from which a jury could have reasonably concluded that these circumstances were due to Fogarty trying to single out and punish the plaintiffs — these facts and circumstances applied to all private providers." *Id.* at 67a-68a.

Regarding the corporate plaintiffs, the court rejected the so-called "disparity evidence" purporting to show that the plaintiffs received smaller reimbursements per "unit of service" on average than other providers. *Id.* at 79a. The court found that "even if the disparity evidence was sufficient to prove that someone treated [the corporate plaintiffs] unfairly, it does not support the further inference that Fogarty was the person doing so." *Id.* Further, "there was no evidence that this 'disparity' in reimbursement levels occurred after and because of plaintiffs' protected First Amendment activities." *Id.* Moreover, the court held that "the proffered evidence failed to support the inference that the corporate plaintiffs were, in fact, similarly situated to the mental health services providers" whose reimbursement rates were allegedly higher. *Id.* at 81a. Accordingly, the court granted Mr. Fogarty's motion for judgment as a matter of law as to the corporate plaintiffs. *Id.* at 92a.

The court also granted Ms. Fritz's motion for judgment as a matter of law in its entirety. It held that "[a]s with Fogarty, there was no evidence that Fritz told OFMQ to cut" a provider's approved units,

slow the processing of its requests, or take adverse action of any sort, nor was there any evidence "that Fritz's actions caused or contributed to the 'disparity' in reimbursements compared to other providers." *Id.* at 94a. The fact that Ms. Fritz's duties included dealing with OFMQ was "not enough to support an inference that Fritz in fact used her power or position to harm" a provider. *Id.* The Court concluded that there was insufficient evidence "from which the jury could have reasonably concluded she took some adverse or retaliatory action" against either of the two plaintiffs to whom damages had been awarded against Ms. Fritz. *Id.* at 93a-96a.

5. The Court of Appeals' Opinion. Respondents appealed from the district court's order granting judgment as a matter of law, and from the district court's 2003 order granting a new trial.[2] App., *infra*, 14a. Petitioners cross-appealed, seeking judgment as a matter of law as to all plaintiffs. *Id.* In their appeals, Petitioners again asserted that they were entitled to qualified immunity from suit.

In a footnote, the Tenth Circuit held that Petitioners had waived their qualified immunity defense. *Id.* at 16a-17a n.9. The court acknowledged that Petitioners moved to dismiss Respondents' claims on qualified immunity grounds before the first trial, and that "[t]hose motions were denied." *Id.* Nonetheless, the court held that "[d]efendants must diligently raise the defense during pretrial

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[2] Respondents also appealed from the district court's attorneys' fees award. App., *infra*, 14a.

proceedings *and ensure it is included in the pretrial order.*" *Id.* (emphasis added).

The Tenth Circuit then reversed the district court's 2003 decision to grant a new trial. The court of appeals held that the standard of review when a district court *denies* a motion for a new trial is abuse of discretion. *See id.* at 15a. "Yet when appellate review is of a district court's *grant* of a new trial, we subject that decision to more stringent scrutiny in order that the district court's judgment not be substituted for the jury's." *Id.* at 15a-16a (emphasis added). The court held, "'[t]his is particularly true when the motion is granted on the ground that the verdict is against the weight of the evidence.'" *Id.* at 16a (quoting *Hutchinson* v. *Stuckey*, 952 F.2d 1418, 1421 (D.C. Cir. 1992)). In such cases "'close scrutiny is required in order to protect the litigants' right to jury trial.'" *Id.* at 16a, quoting 952 F.2d at 1421.

After "wad[ing] through the evidence presented at the first trial," *id.* at 19a, the court recognized "the validity of the district court's concerns with respect to the admittedly imperfect disparity evidence," and "share[d] the district court's skepticism about the evidence offered with respect to retaliatory audits." *Id.* at 28a, 31a. Nevertheless, the court concluded based on its own review of the paper record, without the opportunity to evaluate the credibility of the witnesses, that there was some circumstantial evidence to support a finding of retaliation, and it reversed the district court's new trial grant, reinstating the first trial verdict as to Petitioners. *Id.* at 53a.

The court ordered remittitur, however, with regard to all but $450,000 of the compensatory

damages awarded to the individual Respondents, finding that the awards "are so excessive as to shock the judicial conscience." *See id.* at 41a-47a. With the exception of $265,500 awarded to one plaintiff (which was remitted to nominal damages), the court did not set the amount of the remittitur. *Id.* at 44a-46a. The court did, however, note that the two-thirds reduction ordered in a different case might provide guidance. *Id.* at 45a. If the district court accepted the court of appeals' suggestion, Petitioners would still be liable for nearly $3 million in compensatory damages.

The court remanded for yet a third trial on the corporate plaintiffs' damages. The court found that Respondent's expert's testimony on lost profits "was not simply imprecise – rather, it had the air of fantasy," and that in order to accept the expert's calculations, a juror "would have to make a series of outlandish assumptions that find little support in the record." App., *infra*, 51a.

Despite rejecting nearly all of the original $33 million compensatory award as either unsupported by the evidence or shocking to the judicial conscience, the court of appeals reinstated *all* of the $900,000 punitive damages award against Petitioners. *See id.* at 49a.[3]

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[3] The original $1.35 million punitive damages award was divided equally among Petitioners and their co-defendant, Ms. Brown. App., *infra*, 8a.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's opinion imposes continuing litigation and ruinous personal liability on state officials who were simply doing their job—exactly the results that the qualified immunity doctrine seeks to avoid. Its cursory conclusion that immunity had been waived conflicts with the decisions of other courts of appeals and is in tension with accepted principles of qualified immunity established by this Court.

The court of appeals' application of a heightened standard of review to the grant of a new trial is likewise contrary to this Court's decisions and exacerbates an existing conflict among the courts of appeals.

Finally, the court's reinstatement of nearly $1 million in punitive damages against individual state officials who will be personally liable also merits review.

I. The Tenth Circuit's Opinion Creates A Split Among The Circuits On Whether Qualified Immunity Is Waived If Not Included In a Pretrial Order.

The Tenth Circuit held in this case that Petitioners' qualified immunity defense was waived because it was not included in the pretrial order. This holding conflicts with the decisions of three other courts of appeals. It is directly contrary to the position taken by the Seventh Circuit, which has held that any affirmative defense already raised and ruled upon by the trial court need not be raised in the pretrial order in order to be preserved for appeal.

The decision also conflicts with decisions of the First and Fifth Circuits, which have held that qualified immunity is not waived by the failure to include it in the pretrial order.

Contrary to the Tenth Circuit's opinion, the Seventh Circuit has held that failure to include a defense in the pretrial order did not waive the defense where the issue was rejected in motions practice prior to trial. *Calderon* v. *Witvoet*, 999 F.2d 1101 (7th Cir. 1993). At issue in *Calderon* was whether defendant farm owners in a Fair Labor Standards Act suit had waived the right to present an affirmative defense limiting liability based on the FLSA's three-year statute of limitations. *Id.* at 1108. The farm owners had pleaded the statute of limitations in their answer, and then "relied on the statute in opposition to the plaintiffs' motion for summary judgment." *Id.* The district court granted the motion "without discussing this defense." *Id.* "The only explanation the district court gave for including [3 years before the statute began to run] in this award was that the [farm owners] waived the defense of the statute of limitations by not listing it in the final pretrial order as a subject requiring decision." *Id.*

On appeal, the Seventh Circuit held that "[n]othing in the Rules of Civil Procedure tells counsel that to preserve issues for appeal they must insert into the pretrial order contentions that have already been rejected by the judge." *Id.* It remarked that it was "no surprise" that the farm owners "did not attempt to identify in the pretrial order any issue concerning the statute of limitations; the judge had told them, twice, that no such question

was open," noting that "[r]ules concerning timely presentation and forfeiture are designed to ensure that the parties present their arguments at the appropriate time." *Id.* The court held that requiring parties to raise issues in the pretrial order already rejected by the district court "sets a trap for the unwary without advancing the orderly resolution of litigation," and "would ensnare even wary litigants." *Id.*

The Seventh Circuit has since confirmed that *Calderon* is an exception to the rule that issues not raised in a pretrial order are forfeited, stating that "to preserve the possibility of appeal, the parties need not list an issue that was resolved before trial." *Nagy* v. *Riblet Prods. Corp.*, 79 F.3d 572, 575 (7th Cir. 1996) (Easterbrook, J.).

While the Seventh Circuit's opinion addresses the inclusion of affirmative defenses in a pretrial order generally, other courts of appeal have reached similar conclusions with respect to qualified immunity specifically. The First Circuit has held that a defendant's failure to include qualified immunity in a pretrial order did not waive the defense for purposes of the trial. In *Guzman-Rivera* v. *Rivera-Cruz*, the defendant state officials raised qualified immunity for the first time in their answer to an amended complaint filed three days before trial was scheduled to begin, and first moved for summary judgment on qualified immunity in their third summary judgment motion eight months later. 98 F.3d 664, 669 (1st Cir. 1996).

The First Circuit held that defendants' late assertion of the defense waived qualified immunity, but only "for the current stage of the litigation" *i.e.*,

pre-trial. The court held that "[b]ecause the defense of qualified immunity may be raised and appealed at multiple stages of the trial, it would be inappropriate to find waiver for all stages in the current case." *Id.* Accordingly, the decision "le[ft] defendants free to present the qualified immunity defense at trial, despite the fact that the defense is waived for pre-trial purposes." *Id.* Consistent with this approach, the First Circuit has also reviewed a qualified immunity claim that was raised for the first time in a motion for judgment notwithstanding the verdict. *O'Connor* v. *Huard*, 117 F.3d 12, 17 (1st Cir. 1997) (applying plain error standard of review).

The Fifth Circuit has similarly held that qualified immunity is not waived by the failure to list it in the pretrial order. *Spann* v. *Rainey*, 987 F.2d 1110 (5th Cir. 1993). As here, *Spann* involved a qualified immunity claim raised after the district court granted a new trial following a jury verdict. The plaintiff in *Spann* was a diabetic arrested after acting irrationally during an episode in his doctor's reception area. *Id.* at 1112 & n.3. In response to Spann's Section 1983 civil rights action, the defendant officers asserted qualified immunity in their answers to the complaint. *Id.* The officers did not move for dismissal on that ground before trial, nor did they list the defense in the pretrial order. *Id.* at 1112-13, 1114 n.6. Following a jury verdict for the officers, the district court granted a motion for a new trial with respect to one defendant, who then unsuccessfully moved to dismiss the case or for summary judgment based on qualified immunity. *Id.* at 1112-13.

On appeal, the plaintiff argued that the defendant waived qualified immunity by failing to list the defense in the pretrial order and by failing to seek dismissal prior to trial. *Id.* at 1113, 1114 n.6. The Fifth Circuit did not accept either argument. *Id.* The court recognized that "the interests at the heart of qualified immunity are best served when, unlike here, the defense is asserted at the earliest possible stage." *Id.* at 1114. But the court went on to hold that "[t]hose interests are still served, however, even if in a more limited fashion, by assertion of the defense at some later stage." *Id.* The court concluded that the defendant's "interests in the avoidance of a second trial and, ultimately in avoiding liability, would still be served by a successful assertion of the defense at this stage." *Id.*

The Tenth Circuit's refusal to review the denial of qualified immunity on appeal from final judgment also cannot be reconciled with several appellate decisions holding that qualified immunity is not waived if an official elects not to immediately appeal the denial of a motion to dismiss or a motion for summary judgment on qualified immunity grounds. While this Court's decisions provide that an interlocutory appeal is available, *see Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996), *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), a number of lower courts have recognized that "the right not to pay damages and the right to avoid trial are distinct aspects of immunity, and the former may be raised on appeal at the end of the case even if defendants bypass their right to appeal under *Forsyth* before trial." *Apostol* v. *Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989); *see also Pierce* v. *Smith*, 117 F.3d 866, 871

n.4 (5th Cir. 1997) ("The failure to take an interlocutory appeal from the denial of a pretrial motion to dismiss or for summary judgment does not waive the defense of qualified immunity."); *Littlewind* v. *Rayl*, 33 F.3d 985, 986-87 (8th Cir. 1994) ("We acknowledge that defendants were not required to file an immediate interlocutory appeal from the . . . pretrial order denying their qualified immunity defense in order to preserve the qualified immunity issue on appeal."); *but see Kennedy* v. *City of Cleveland*, 797 F.2d 297, 304 (6th Cir. 1986) (appeal from denial of qualified immunity motion waived if not appealed within 30 days).

Finally, the Tenth Circuit's decision is in tension with courts of appeals that have reviewed qualified immunity on appeal even if not raised at trial. For example, the Eleventh Circuit reviewed a qualified immunity defense *de novo* where the defendant pled qualified immunity in the answer "but notably did not pursue the defense further by either a pretrial motion to dismiss or for summary judgment." *Alexander* v. *Fulton County, Ga.*, 207 F.3d 1303, 1320 & n. 10 (11th Cir. 2000). Similarly, the Ninth Circuit has reviewed a denial of qualified immunity raised for first time after verdict for plain error "in the interest of justice." *Kelly* v. *City of Oakland*, 198 F.3d 779, 784 (9th Cir. 1999).

The Tenth Circuit appears to stand alone in refusing to consider a qualified immunity defense on appeal solely on the grounds that it was not included in the pretrial order. App., *infra*, 16a-17a n.9. Its decision creates exactly the kind of trap, rejected by the Seventh Circuit, that "would ensnare even wary litigants" even though "[n]othing in the Rules of Civil

Procedure tells counsel that to preserve issues for appeal they must insert into the pretrial order contentions that have already been rejected by the judge." *Calderon,* 999 F.2d at 1108.

Moreover, by treating qualified immunity as waived *for all purposes* based on the failure to include it in the pretrial order, the opinion below is directly contrary to the First and Fifth Circuits' decisions in *Guzman-Rivera* and *Spann,* both of which recognize that the nature of a qualified immunity defense is such that it can be raised at any time. Unlike the Tenth Circuit, the decisions in those Circuits' cases are faithful to this Court's teaching that qualified immunity is a defense to liability as well as an immunity from suit. *See Mitchell* v. *Forsyth,* 472 U.S. 511, 526 (1985); *Gomez* v. *Toledo,* 446 U.S. 635, 639 (1980). As the Fifth Circuit explained in the *Spann* case, the interests that this Court has identified as behind qualified immunity--"distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"--are still served even if the defense does not avoid a trial but is asserted at some later stage. 987 F.2d at 1114, quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 816 (1982); *see also Guzman-Rivera,* 98 F.3d at 669 ("Because the defense of qualified immunity may be raised and appealed at multiple stages of the trial, it would be inappropriate to find waiver for all stages in the current case.").

This Court has repeatedly recognized that the availability of qualified immunity—and the opportunity for appellate review of any decision withholding such immunity—is vitally important if

government officials are to exercise their discretion in carrying out the responsibilities of government. *See, e.g., Mitchell*, 472 U.S. at 526-27. This is especially so for public servants, like petitioners, who have responsibilities for administering complex and costly government programs, and who often are sued personally for their agency's actions as a result of the State's own Eleventh Amendment immunity from suit. As the case law indicates, the issue of whether, when, and for what purposes a qualified immunity defense can be waived is important and recurring. In light of the important interests underlying the qualified immunity of government officials, the issue merits this Court's consideration and further guidance.

II. The Tenth Circuit's Opinion Deepens A Split Among The Courts Of Appeals On The Standard Of Review Of A District Court's Grant Of A Motion For A New Trial.

This Court has held that "[t]he trial judge in the federal system has . . . discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence." *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 540 (1958). "This discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." *Gasperini* v. *Ctr. for Humanities*, 518 U.S. 415, 433 (1996). Accordingly, the courts of appeals have generally reviewed a district court's decision on a motion for a new trial, to set aside the verdict, or for remittitur for abuse of discretion. *E.g., Stamathis* v.

Flying J, Inc., 389 F.3d 429, 439 (4th Cir. 2004) ("Because setting aside a verdict as excessive is within the discretion of the trial court, we review for abuse of discretion.").

Prior to 1996, some courts of appeals held the view that the Seventh Amendment's prohibition on reexamination of facts "tried by a jury" counseled a more stringent review than abuse of discretion when a district court grants a motion for a new trial. In the *Gasperini* case, however, the Court held that "appellate review [of district court excessiveness decisions] for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice." 518 U.S. at 435.

Following *Gasperini*, the courts generally have stated that abuse of discretion governs review of a decision to order a new trial. *Compare, e.g., Radwan* v. *Carteret Bd. of Educ.*, 62 F. App'x 34, 37 (3d Cir. 2003) (unpublished) ("[W]e will reverse an order for a new trial only where we conclude that the district court abused its discretion.") *with Lind* v. *Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960) (Appellate court must "exercise a closer degree of scrutiny" when the trial judge "grants a new trial on the ground that the verdict was against the weight of the evidence . . . in order to protect the litigants' right to jury trial."); *see also Medcom Holding Co.* v. *Baxter Travenol Lab.*, 106 F.3d 1388, 1397 & n.3 (7th Cir. 1997) ("abandon[ing] the practice," in light of *Gasperini*, of applying "abuse of discretion standard of review 'somewhat more exactingly' when the district court granted a motion for a new trial").

The Tenth Circuit here acknowledged the abuse of discretion standard approved in *Gasperini*, yet went on to apply "more stringent scrutiny" to the district court's decision to grant a new trial. App., *infra*, 15a-16a. The court of appeals' decision is in tension with *Gasperini* itself, and directly conflicts with several other circuits that have specifically applied abuse of discretion to the grant of a new trial. Still other courts of appeals, like the Tenth Circuit, continue to apply a more rigid approach.

A. Five Circuits Specifically Apply Abuse Of Discretion To Review New Trial Grants.

Five circuits have specifically stated that the abuse of discretion standard governs appellate review of a district court's *grant* of a new trial motion.

The Seventh Circuit has held that "We review the district court's grant of a motion for a new trial for abuse of discretion." *McClain* v. *Owens-Corning Fiberglas Corp.*, 139 F.3d 1124, 1126 (7th Cir. 1998). The Seventh Circuit formerly applied the "abuse of discretion standard of review 'somewhat more exactingly' when the district court granted a motion for a new trial because of *Seventh Amendment* considerations," but in light of this Court's "decision in *Gasperini* that an abuse of discretion standard of review does not violate the *Seventh Amendment*," it "abandon[ed] this practice as unnecessary." *Medcom Holding Co.* v. *Baxter Travenol Labs., Inc.*, 106 F.3d 1388, 1397 & n.3 (7th Cir. 1997) .

The Second Circuit has likewise held: "This court reviews the grant of a new trial on the ground

that the verdict was against the weight of the evidence for abuse of discretion. *Amorgianos* v. *Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 261 (2d Cir. 2002); *see also Farrior* v. *Waterford Bd. of Educ.*, 277 F.3d 633, 634 (2d Cir. 2002) ("A district court's grant of a new trial on the ground that the verdict was against the weight of the evidence is reviewed for abuse of discretion."); *Cross* v. *N.Y. City Transit Auth.*, 417 F.3d 241, 258 (2d Cir. 2005) ("We review a district court's ruling on a remittitur motion '*only* for abuse of discretion.'" (emphasis added)), quoting *Rangolan* v. *County of Nassau*, 370 F.3d 239, 245 (2d Cir. 2004) ("Where the district court has decided whether and/or to what extent the jury's verdict was excessive, its decision is reviewable only for abuse of discretion.").

The Fourth Circuit too has held that "[t]he decision *to grant or deny* a new trial is within the sound discretion of the district court, and we respect that determination absent an abuse of discretion." *Cline* v. *Wal-Mart Stores*, 144 F.3d 294, 301 (4th Cir. 1998) (emphasis added).

And the Fifth Circuit has stated that "[t]he district court's decision to *grant or deny* a Rule 59(a) motion will be reversed *only* for an abuse of discretion." *United States* v. *Flores*, 981 F.2d 231, 237 (5th Cir. 1993) (emphasis added). Even before *Gasperini*, the Eighth Circuit likewise stated, "the abuse of discretion standard has been applied in our circuit *only* to orders *granting* new trials." *Czajka* v. *Black*, 901 F.2d 1484, 1485 (8th Cir. 1990) (emphasis added).

B. The Tenth Circuit Is One Of Four That Apply A More Searching Inquiry.

Contrary to the holdings of five circuits, the Sixth, Tenth, Eleventh, and D.C. Circuits apply a closer degree of scrutiny to decisions that *grant* a new trial than to decisions that *deny* the request for a new trial.

Here, the Tenth Circuit stated that although it applies abuse of discretion when reviewing a district court's denial of a new trial, "when appellate review is of a district court's *grant* of a new trial, we subject that decision to more stringent scrutiny in order that the district court's judgment not be substituted for the jury's." App., *infra*, 15a-16a. "'This is particularly true when the motion is granted on the ground that the verdict is against the weight of the evidence.'" *Id.* at 16a, quoting *Hutchinson* v. *Stuckey*, 952 F.2d 1418, 1421 (D.C. Cir. 1992). While the court of appeals cited cases from the Sixth, Third, and D.C. Circuits for this proposition, all of the cases it cited were pre-*Gasperini*.

Nevertheless, the Sixth and D.C. Circuits continue to apply closer scrutiny to a district court's grant of a new trial. The Sixth Circuit holds that the appeals court has a duty "'to exercise a *closer degree of scrutiny*'" when a new trial is granted "on the basis that the verdict was against the weight of the evidence." *Denhof* v. *City of Grand Rapids*, 494 F.3d 534, 543 (6th Cir. 2007), quoting *Duncan* v. *Duncan*, 377 F.2d 49, 52 (6th Cir. 1967). "'Such a close scrutiny is required in order to protect the litigants' right to jury trial.'" *Id.*

The D.C. Circuit has adhered to its decision in *Hutchinson* v. *Stuckey* (cited by the Tenth Circuit here), that where "the trial court grants a motion for new trial, 'a more searching inquiry is required,' because of 'the concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding function.'" 952 F.2d at 1420-21 (citations omitted). *See Langevine* v. *District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997).[4]

The Eleventh Circuit also applies more exacting scrutiny than abuse of discretion. In perhaps the most forthright discussion among the cases that apply greater scrutiny to new trial grants, the Eleventh Circuit stated:

> As for orders granting a motion for new trial, we have said that we generally review such orders for clear abuse of discretion. Although we have said that, we have also observed that we "accord less deference to a district court's grant of a new trial than the 'abuse of discretion' standard of review implies." To be honest about it, at least insofar as weight of the evidence is concerned: the label 'abuse of discretion' belies the standard of review that we actually apply to grants of motions for a new

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[4] In *Langevine*, the D.C. Circuit stated that the order granting a new trial at issue in that case "is reviewed for abuse of discretion," but nevertheless went on to recite the "more searching inquiry" language and reversed the grant. 105 F.3d at 1023.

> trial. We may conclude that the district court overreached its authority by granting a new trial if our review of the record reveals that the evidence did not preponderate heavily against the jury's verdict. The grant of a motion for new trial generally is more closely scrutinized than a denial, and the grant of new trial based on the weight of the evidence is more closely scrutinized than the grant of new trial on other grounds.

Butcher v. *United States*, 368 F.3d 1290, 1297 (11th Cir. 2004) (citations and footnote omitted). The Eleventh Circuit has also noted, "While we do not conduct pure *de novo* review in these circumstances, the review that we do conduct is not much different because we want 'to assure that the judge does not simply substitute his judgment for that of the jury.'" *Id.*

C. Under This Court's Decision In *Gasperini*, The Tenth Circuit Should Have Upheld The District Court's Grant Of A New Trial As Within Its Discretion.

Because the decision to grant or deny a new trial is within the district court's discretion, review of that decision should be based on whether the district court abused its discretion. *Gasperini*, 518 U.S. at 433. There is no reason to believe that a district court would be any more likely to abuse its discretion when it grants a new trial than when it denies a new trial. Accordingly, the standard of review should not depend on the result of the district court's decision.

In this case, the district court, which had the opportunity to hear all the testimony and evaluate the credibility of the witnesses at the first trial, did not abuse its discretion in granting a new trial. The court correctly noted that an individual defendant's liability in a Section 1983 action must be based on that individual's personal participation in the allegedly wrongful activity and held that the evidence against Mr. Fogarty and Ms. Fritz was either pure speculation or based on "little more than proof that the particular defendant was a supervisor of some activity at OHCA." App., *infra*, 101a. The Court of Appeals' "more stringent scrutiny" led it to cull out small items of circumstantial evidence that, in its view, might have supported the jury verdict, even as it agreed with the district court that the principal evidence in support of the alleged retaliation—the corporate plaintiffs' evidence that they were reimbursed less than other private providers—had the "air of fantasy" and would have required the jury "to make a series of outlandish assumptions that find little support in the record." *Id.* at 51a. Under the proper abuse of discretion standard of review, the district court's assessment of the totality of the evidence against Petitioners would have prevailed.

III. The Tenth Circuit Erred In Reinstating The Punitive Damages While Remitting Or Remanding Most Of The Compensatory Damages Award.

Certiorari is also warranted in this case because of the Tenth Circuit's decision to reinstate the entire $900,000 punitive damages award against

Petitioners despite having remitted nearly all of the compensatory award.

The punitive damages award will not be paid by insurance, nor will it be indemnified by the state. *See* Okla. Stat. tit. 51, § 162(D) ("The state or a political subdivision shall not, under any circumstances, be responsible to pay or indemnify any employee for any punitive or exemplary damages rendered against the employee."); *Magnum Foods, Inc.* v. *Continental Casualty Co.*, 36 F.3d 1491, 1497 (10th Cir. 1994) ("Oklahoma courts adhere to the view that public policy prohibits liability insurance coverage of punitive damages except where the party seeking the benefit of insurance coverage has been held liable for punitive damages solely due to conduct of another, under principles of vicarious liability."); *Dayton Hudson Corp.* v. *American Mut. Liability Ins. Co.*, 621 P.2d 1155, 1156 (Okla. 1980) ("[P]ublic policy is generally contravened by coverage of punitive damages.").

The court below erred by reinstating the first jury's punitive damages award even though that award was surely linked to it's $33 million compensatory damage award, which the court largely remitted or remanded. That reinstatement fails to take account of the fact that "'the basic purpose' of § 1983 damages is 'to *compensate persons for injuries* that are caused by the deprivation of constitutional rights.'" *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986), quoting *Carey* v. *Phiphus*, 435 U.S. 247, 254 (1978) (emphasis supplied). While punitive damages may be awarded in a Section 1983 case, "[t]he principle that exemplary damages must bear a 'reasonable

relationship' to compensatory damages has a long pedigree." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 580 (1996). Where, as here, the basis for the compensatory damages award is undermined or found to be invalid, the existence of a "reasonable relationship" between that award and the punitive damages award is called into serious question.

Here, almost all of the jury's compensatory damages award was remitted as shocking to the judicial conscience or remanded for lack of support in the record. *See* App., *infra*, 43a-47a, 51a-52a. The corporate plaintiffs' damages were based on the flawed evidence of Respondents' expert, which the court of appeals said was "not simply imprecise – rather, it had the air of fantasy," and would require a juror "to make a series of outlandish assumptions that find little support in the record." App., *infra*, 51a. The court found that the jury accepted this evidence, resulting in an award that was "speculative, remote, imaginary, or impossible of ascertainment." *Id.* at 52a.

The compensatory damages to the individual plaintiffs were largely remitted by the court of appeals for nominal damages or with an implied suggestion to reduce by two-thirds or more. *Id.* at 43a-47a. The court found these awards "are so excessive as to shock the judicial conscience." *Id.* at 44a.

The court's rejection of nearly the entire damages award calls into question the validity of the punitive damages award because it radically changes the "reasonable relationship" question articulated in *Gore*. The same flawed evidence that led the jury to a damages award shocking to the judicial conscience

an award that the court found "speculative" undoubtedly infected the jury's consideration of punitive damages. As an additional consideration in favor of certiorari, the Court should consider whether a punitive damages award against an individual state official sued personally in a Section 1983 case may be upheld where the underlying compensatory damages award has been substantially overturned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2008

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 05-6106, 05-6109, 05-6110, 05-6112, 05-6122, 05-6358, 05-6359, & 05-6361

ALFRED MILTON EVANS, an individual; SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC., a corporation; RUSTLING WINDS, INC., an Oklahoma corporation; MORNING STAR MENTAL HEALTH SERVICES, INC., an Oklahoma corporation; DIVERSIFIED FAMILY SERVICES, INC., an Oklahoma corporation; SERENITY SPRINGS MENTAL HEALTH SERVICES, L.L.C., an Oklahoma corporation; JCH, INC., an Oklahoma corporation; NEAL THRIFT, an individual; NANCY GRAVES-THRIFT, an individual; JOHN MAJORS, an individual; CYNTHIA MAJORS, an individual; CHARLES PARKHURST, an individual; MARY PARKHURST, an individual; LEROY WHEELER, an individual; and JOEL HOLCOMB, an individual,

Plaintiffs-Appellants/Cross-Appellees,

v.

MICHAEL FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority;

TERRIE FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority; and DANA BROWN, in her individual capacity, as well as in her official capacity as Legislative Liaison for the Oklahoma Health Care Authority; TENKILLER BEHAVIORAL SERVICES INC., an Oklahoma corporation; DAVETTA MCINTOSH, an individual,

Defendants-Appellees / Cross-Appellants.

ORDER AND JUDGMENT*

Filed, August 22, 2007

Before TACHA, Chief Circuit Judge, McWILLIAMS, Senior Circuit Judge, and LUCERO, Circuit Judge.

This case arises from a bare-knuckled political battle over state funding for outpatient behavioral and mental health services in Oklahoma between 1998 and 2002. It has resulted in a series of cases of unusual procedural complexity, as well as two jury verdicts. We conclude that the district court abused its discretion in granting a new trial following the

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

first verdict. Exercising jurisdiction under 28 U.S.C. § 1291, we REVERSE.

I

During the period at issue, plaintiffs[1] operated clinics, predominantly in rural areas of Oklahoma, providing services to adults and children with mental and behavioral disorders. Plaintiffs relied almost exclusively on Medicaid funding to cover the cost of providing these services, and their private clinics were among many publicly funded facilities that offered such services. Medicaid funding also flowed to state-affiliated community mental health centers ("CMHCs"), which are typically paid more than private providers for the same services.

Michael Fogarty, Terrie Fritz, and Dana Brown ("defendants") were senior officials of the Oklahoma Health Care Authority ("OHCA"), the agency charged with administering Medicaid funds, during the relevant period. Fogarty was hired as the Oklahoma state Medicaid director in 1995 and was promoted to Chief Executive Officer of OHCA in September 1999. Fritz worked under Fogarty as OHCA's Director of Behavioral Health Services. Brown also worked under Fogarty as OHCA's legislative liaison in the state Capitol.

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[1] Individual plaintiffs include: Alfred Milton Evans, John Majors, Cynthia Majors, Joel Holcomb, Neal Thrift, Nancy Graves-Thrift, Leroy Wheeler, Charles Parkhurst, and Mary Parkhurst. Corporate plaintiffs include: Southeastern Oklahoma Family Services, Inc. ("SOFS"), Morning Star Mental Health Services, Inc. ("Morning Star"), JCH, Inc., Rustling Winds, Inc., Serenity Springs Mental Health Services, L.L.C., and Diversified Family Services, Inc. ("DFS").

By the late 1990s, Fogarty, Fritz, and other officials at OHCA faced substantial pressure to reduce Medicaid costs. At the same time, private providers of behavioral and mental health services were competing with CMHCs for the limited budget available for such services. Private providers had expanded rapidly, and by the year 2000 numbered some 180, located at 330 sites. Medicaid funds paid to these private providers grew from $3.1 million in 1994 to $22.1 million in 1997. Fogarty and other OHCA officials viewed the rise in overall expenditures with alarm.[2] They also grew concerned about the relatively limited oversight of private providers, which they believed created an opportunity for fraud, mismanagement, and the provision of substandard services. Accordingly, OHCA took a number of steps to limit the growth in Medicaid reimbursements to private providers and to engage in more aggressive oversight of these private facilities.

A number of private providers took umbrage with OHCA's policies during this period and came to believe that Fogarty and others wanted to drive private providers out of business. As their dissatisfaction increased, a group of private providers banded together in late 1998 to form the Oklahoma Private Mental Health Providers Association ("Association"). All individual plaintiffs were members of the Association, which lobbied

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[2] OHCA overspent the behavioral health budget line item by more than one hundred percent between 1996 and 1998.

extensively in the state legislature, the Governor's office, and elsewhere in support of its interests.

Conflict between the Association and the defendants first came to a head in 1998, when the Association successfully persuaded the Governor not to sign a set of "emergency" rules proposed by OHCA. Those rules would have required, among other things, all therapists to obtain a master's degree within six months of adoption of the rules. Defendants supported this rule as a way to ensure quality and consistency of services, but the Association persuaded the Governor that the rules would put most private providers out of business. A second conflict arose when, in July 1999, OHCA imposed across-the-board cuts in "units of service" for mental health services by 30 percent for adults and by 5 percent for children.[3] Faced with a steep

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[3] Some knowledge of OHCA's reimbursement procedures is a predicate to understanding plaintiffs' claims. Private providers and CMHCs were reimbursed on the basis of "units" of services provided to individual patients. Beginning in 1996, and in response to rising expenditures, each private provider was required to submit a treatment plan to the Oklahoma Foundation for Medical Quality ("OFMQ"), an independent, non-profit foundation; CMHCs were not subject to preapproval of treatment plans. OFMQ's primary responsibility is to vet individual treatment plans under a set of objective "medical necessity" criteria. Plans were approved on the basis of an authorized number of units, each of which represented a certain amount of a specific type of therapy or rehabilitation. Units were not priced uniformly across therapies – for example, the reimbursement rate for a unit of individual counseling was $27.23 during the relevant period as against $5.63 for a unit of group rehabilitation. Total reimbursement for each patient depended on the number and type of units OFMQ approved (and on whether the provider in fact billed all approved units for each patient).

drop in revenue as a result of the cuts, the Association persuaded the legislature to pass a $500,000 supplemental appropriation in February 2000 and then a further appropriation of $1.1 million in May 2000. When combined with federal matching funds, the supplemental appropriation resulted in a $5.2 million influx, intended to restore funding to prior levels. A third conflict arose over proposed legislation, known as House Bill 1075, which would have equalized funding and oversight between CMHCs and private providers. The Association unsuccessfully supported the bill as a means of "leveling the playing field" between all providers of behavioral and mental services; defendants opposed it.

On February 6, 2001, Evans, SOFS, and certain SOFS patients filed suit under 42 U.S.C. § 1983 against the defendants, Lynn Mitchell, OHCA State Medicaid Director, and members of the OHCA Board in their official capacities. That suit alleged unlawful termination of SOFS' Medicaid contract, unlawful denial of requests for reimbursement, and First Amendment retaliation. Those plaintiffs sought injunctive relief, compensatory damages, and certification of a class action.[4] On April 10, 2001, Rustling Winds and the other plaintiffs filed a similar § 1983 action against the defendants, Mitchell, members of the OHCA Board in their

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[4] The court granted injunctive relief in that case, preventing the termination of SOFS' Medicaid contract. We affirmed. See *Evans* v. *Fogarty*, 44 F. App'x 924 (10th Cir. 2002).

official capacities, and OFMQ.[5] The district court consolidated those actions on May 15, 2002. Plaintiffs filed a third amended complaint on June 25, 2002.

All plaintiffs went to trial on April 14, 2003, solely on their § 1983 First Amendment retaliation claim.[6] Over the course of the trial, plaintiffs presented evidence in support of several alleged patterns of retaliation, each of which, they argued, sufficed to prove their claim against all three defendants. Plaintiffs first testified that defendants, particularly Fogarty and Brown, spoke to plaintiffs on numerous occasions in rude, threatening, and demeaning terms. Second, they stated that defendants singled out some of the plaintiffs for "retaliatory" audits by the Surveillance Utilization Review Subsystem ("SURS") unit within OHCA, which was responsible for auditing Medicaid recipients throughout the state. Third, plaintiffs alleged that defendants directed OFMQ to reduce their reimbursement rates by rejecting requests for higher value units, and further directed OFMQ to impose greater administrative burdens on them. Fourth, plaintiffs claimed that defendants prevented

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[5] Several parties in the *Rustling Winds* litigation are no longer part of this case. Various original plaintiffs have dropped out and plaintiffs' claims against OFMQ were later dismissed. Mitchell, and a subsequently added defendant, Jana Webb, were granted judgment as a matter of law ("JMOL") at trial. Neither of those orders is before us on appeal.

[6] Pre-consolidation, the Evans and Rustling Winds district courts separately granted defendants' motion to dismiss as to all claims other than plaintiffs' First Amendment retaliation claim.

them from receiving their share of the supplemental appropriations approved by the Oklahoma legislature in 2000. They provided evidence showing that non-politically active providers received, on average, higher reimbursement rates per unit of service.

The jury returned a verdict in favor of all plaintiffs and against all defendants in the amount of $33,095,000, and returned a subsequent punitive damages verdict in the amount of $1,350,000. Of the compensatory damages, $24 million was awarded to the various corporate plaintiffs, and the remainder was awarded to the various individual plaintiffs. All compensatory damages were allocated between defendants according to the same ratio – 60 percent from Fogarty, 30 percent from Fritz, and 10 percent from Brown. Punitive damages were awarded in the amount of $50,000 for each individual plaintiff against each defendant. Following the verdict, the court considered defendants' motions for JMOL under Fed. R. Civ. P. 50(b).[7] On July 9, 2003, it entered an order denying JMOL to Fogarty and Fritz as to all plaintiffs, and granting JMOL to Brown, but only as to the corporate plaintiffs and Holcomb. In the same order, the court denied plaintiffs' request for injunctive relief against members of the OHCA

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[7] Defendants moved for JMOL under Rule 50(a) at the close of plaintiffs' case. Although the district court denied those motions as to Fritz, Fogarty, and Brown at that time, there is some ambiguity in the record as to whether it allowed supplemental briefing on those motions post-trial, or considered the post-verdict motions solely under Rule 50(b).

Board of Directors. That denial is not before us on appeal.

Defendants then filed renewed motions for JMOL and, in the alternative, a new trial or remittitur. On August 25, 2003, the district court granted defendants' motion for a new trial, vacating judgment in the first trial [hereinafter "new trial order"]. The new trial order specifies two primary justifications for vacating the judgment: (1) "[T]he evidence tending to show retaliation against plaintiffs by any of the defendants was extraordinarily thin"; and (2) There was no proper evidentiary basis for either the amount or allocation of the jury's damages awards. *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 3 (W.D. Okla. Aug. 25, 2003). With regard to the first ground, the court stated:

> [M]uch of the evidence offered to establish retaliatory activity by defendants Fogarty, Fritz and Brown bordered on pure speculation and, in some instances, was based on little more than proof that the particular defendant was a supervisor of some activity at OHCA. . . . While the evidence here was sufficient to raise a jury question as to the potential liability of these defendants, that evidence was far from compelling.

Id. With regard to the second ground, the court stated: "[E]ach plaintiff had the burden of establishing not only that plaintiff's entitlement to relief but also the amount of damages that plaintiff had suffered: Here, plaintiffs made no effort to

quantify the economic losses of each corporate plaintiff." *Id.* at 4. It further stated that with respect to the corporate plaintiffs, "[t]he appropriate measure of damages in this case was the lost profits – not lost gross revenues – of the plaintiffs due to defendants' alleged retaliatory actions. . . . Plaintiffs' 'disparity' evidence, to the extent that it proved anything, showed the loss in gross revenues the plaintiffs arguably had from the alleged differential treatment." *Id.* at 5.

A second trial was held from September 15-23, 2004. Although the evidence offered by the parties at the second trial varied somewhat from that offered at the first, plaintiffs alleged the same patterns of retaliatory behavior. Defendants filed a motion for summary judgment based on qualified immunity in advance of the second trial, and reasserted that defense in subsequent motions for JMOL.[8] The district court denied that motion in an order dated December 3, 2003, stating:

> This case has already gone to trial once. The pretrial order entered in the case did not preserve or assert the defense of qualified immunity. While a second trial need not necessarily involve the same witnesses and proof, the Court concludes it is inappropriate . . . to

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[8] Defendants failed to raise an affirmative defense of qualified immunity in the Final Pretrial Report before the first trial, or their motions for JMOL before or after the first trial. Brown alone raised the defense of qualified immunity in her post-trial motion for JMOL.

> permit defendants to raise new and different legal issues or defenses not at issue in the first trial.

Evans v. *Fogarty*, No. CIV-01-0252-HE (W.D. Okla. Dec. 3, 2003). Defendants appealed from this order, and we dismissed their appeal for lack of jurisdiction. *See Evans* v. *Fogarty*, 123 F. App'x 863 (10th Cir. 2005). Additionally, defendants unsuccessfully objected, in advance of the second trial, to the testimony of plaintiffs' expert witness Dale McDaniel. This was in contrast to the first trial, at which McDaniel testified largely without objection.

At the close of the second trial, the jury found for all plaintiffs against Fogarty in the amount of $1,020,000 for the individual plaintiffs and $14,295,000 for the corporate plaintiffs. As to Fritz, the jury found for her against all plaintiffs except Holcomb and his company, JCH, returning verdicts in their favor for $250,000 and $325,000 respectively. As to Brown, the jury found against her as to only two plaintiffs, Neal and Nancy Thrift, returning verdicts for them of $25,000 each. After a second bifurcated punitive damages proceeding, the jury awarded a total of $300,000 in punitive damages to the corporate providers against Fogarty, $7500 to JCH against Fritz, and $500 to each of the Thrifts against Brown.

Following the verdict, defendants renewed their motions for JMOL, which the district court granted in part and denied in part on February 23, 2005. *Evans* v. *Fogarty*, No. CIV-01-0252-HE (W.D. Okla. Feb. 23, 2005). In its order, the court reaffirmed many of the doubts it expressed in the new trial order and its order granting partial JMOL following

the first trial. At heart, the court found plaintiffs' evidence to be almost entirely conjectural as to causation:

> The Court concludes that merely showing that a defendant is the head of an agency or an agency program area, committed unrelated "bad acts," and had serious disputes or disagreements with a plaintiff, combined with evidence that the plaintiff was treated unfavorably by the agency or experienced some sort of undesirable agency action, is not enough, in and of itself, to support an inference that the defendant caused whatever harm the plaintiff objects to.

Id. at 8. More specifically, the court determined that the plaintiffs' most fully-developed theory of retaliation, that defendants directed OFMQ to discriminate against them by rejecting high-rate units, found no support in the record: "There was not . . . evidence from which a jury could have reasonably concluded that these circumstances were due to Fogarty trying to single out and punish the plaintiffs – these facts and circumstances applied to all private providers." *Id.* at 10. The order identifies at least four discrete breaks in the causal chain with respect to the reimbursement disparity evidence: (1) a lack of evidence suggesting Fogarty, Fritz, or Brown had control over OFMQ approvals; (2) a lack of comparative data indicating the alleged disparity occurred after plaintiffs' political activities began; (3) wide variation in the average monthly reimbursement rate between plaintiffs and other

providers (and also among plaintiff providers); and (4) a lack of evidence that plaintiffs provided similar services to other private providers or CMHCs.

On these bases, the court granted JMOL to Fogarty with respect to all the corporate providers and two individual plaintiffs – Mary Parkhurst and Holcomb. Recognizing that § 1983 liability does not extend to defamation, the court nonetheless upheld the jury's verdict against Fogarty in favor of the other individual plaintiffs on the basis of a "defamation plus threat" theory of liability. It held that "defamatory language accompanied by some 'threat, coercion, or intimidation intimating that punishment, sanction or adverse regulatory action will imminently follow,' may support a First Amendment retaliation claim." *Id.* at 12 (quoting *Suarez Corp. Indus.* v. *McGraw*, 202 F.3d 676, 687 (4th Cir. 2000). "Here, although a close question, the Court concludes there was evidence from which the jury could reasonably have found that Fogarty defamed and at least implicitly threatened those plaintiffs present in the meetings [at the state Capitol]." *Id.* at 13. It granted JMOL to Fritz as to all plaintiffs, finding that the same causal breaks with respect to the disparity evidence and control of OFMQ that applied to Fogarty extended to Fritz. *Id.* at 31-33. Finally, it denied JMOL to Brown based on the same "defamation plus threat" theory of liability it relied on to uphold some of the individual damages awards against Fogarty. "[T]he jury could have concluded that Brown made defamatory comments about the Thrifts to legislators or others, under circumstances implying that some punishment,

sanction or adverse regulatory action would imminently follow." *Id.* at 35.

On October 4, 2005, the district court entered an order granting plaintiffs a reduced attorneys' fee award pursuant to 42 U.S.C. § 1988(b). Fees and costs were awarded to the plaintiffs in the amount of $356,749.40 against Fogarty and $60,500 against Brown.

Plaintiffs now appeal from the district court's February 23, 2005 order granting in part and denying in part defendants' motions for JMOL. They seek reinstatement of the first jury verdict in full or, in the alternative, reinstatement of the second jury verdict in full. Defendants Fogarty and Brown cross-appeal from the same order, seeking JMOL as to all plaintiffs. Plaintiffs also appeal from the district court's October 4, 2005 order granting a reduced fee award. In their fee appeal, they seek reimbursement for all fees and costs associated with this litigation. Defendants cross-appeal, arguing that the fee award should be reduced further, or eliminated entirely. We have consolidated the merits appeals (docket numbers 05-6106, 05-6109, 05-6110, 05-6112, 05-6122, and 05-6130) and fee appeals (docket numbers 05-6358, 05-6359, and 05-6361) for purposes of disposition.

II

Plaintiffs appeal from the district court's grant of partial JMOL following the second trial, which we review de novo, viewing all evidence in the light most favorable to the plaintiffs. *Herrera* v. Lufkin Indus., Inc., 474 F.3d 675, 685 (10th Cir. 2007). Under Fed. R. Civ. P. 50 the district court may grant JMOL if "a

reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Defendants Fogarty and Brown cross-appeal from the same order, arguing that JMOL should be granted as to all plaintiffs. "We review de novo a district court's denial of a motion for judgment as a matter of law." *Marshall* v. *Columbia Lea Reg'l Hosp.*, 474 F.3d 733, 738 (10th Cir. 2007) (citation omitted). "In order to reverse the trial court's decision on a motion for directed verdict, we must find the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." *Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1554 (10th Cir. 1991) (quotation and alteration omitted).

However, the unusual procedural posture of this case requires that we first assess plaintiffs' argument that the district court abused its discretion in granting defendants a new trial under Fed. R. Civ. P. 59. Thus far, plaintiffs have not been heard on this argument, as an order granting a new trial under Rule 59 is interlocutory, and thus is not a final decision from which an appeal may be taken under 28 U.S.C. § 1291. *See Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (1980). We review a trial judge's decision on a motion under Rule 59 for abuse of discretion. *See Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 433-35 (1996) (holding appellate review for abuse of discretion does not violate party's Seventh Amendment right to a trial by jury); *Frank* v. *Bloom*, 634 F.2d 1245, 1254-55 (10th Cir. 1980). Yet when appellate review is of a district court's grant of a new trial, we subject that decision to more stringent scrutiny in order that the district court's

judgment not be substituted for the jury's. *See Holmes* v. *City of Massillon*, 78 F.3d 1041, 1047 (6th Cir. 1996); *Hutchinson* v. *Stuckey*, 952 F.2d 1418, 1420-21 (D.C. Cir. 1992); *Lind* v. *Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960). "This is particularly true when the motion is granted on the ground that the verdict is against the weight of the evidence." *Hutchinson*, 952 F.2d at 1421. In those instances, "[s]uch a close scrutiny is required in order to protect the litigants' right to jury trial." *Id.* (quotation omitted).

III

Central to the district court's decision to grant a new trial was its view that "the evidence tending to show retaliation against the plaintiffs by any of the defendants was extraordinarily thin." *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 3 (W.D. Okla. Aug. 25, 2003). Accordingly, our review of the new trial order necessitates that we consider the sufficiency of plaintiffs' evidence at the first trial as to each defendant.

Plaintiffs brought suit against defendants under § 1983, alleging they suffered retaliation related to their exercise of First Amendment rights. "Although retaliation is not expressly discussed in the First Amendment, it may be actionable inasmuch as governmental retaliation tends to chill citizens' exercise of their constitutional rights." *Perez* v. *Ellington*, 421 F.3d 1128, 1131 (10th Cir. 2005) (citation omitted).[9] Outside the public employment

[9] Government officials sued for First Amendment retaliation typically assert the affirmative defense of qualified immunity, (...continued)

context, plaintiffs must prove the following elements to establish a retaliation claim:

> (1) that the plaintiff was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would

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in which case plaintiffs must also prove that "the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985); *see also Perez*, 421 F.3d at 1131. In this case, defendants failed to properly raise a qualified immunity defense in advance of the first trial. Preconsolidation, defendants moved under Fed. R. Civ. P. 12(b)(6) to dismiss both the Rustling Winds and Evans lawsuits, raising qualified immunity in those motions. Those motions were denied, and defendants then failed to assert qualified immunity in their motions for summary judgment, the pretrial order, or in their oral motions for JMOL at the close of the plaintiffs' case. Under these circumstances, we deem the defense waived. "[C]laims, issues, defenses, or theories of damages not included in the pretrial order are waived even if they appeared in the [pleadings]." *Wilson* v. *Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002); *cf. Maestas* v. *Lujan*, 351 F.3d 1001, 1010 (10th Cir. 2003) (holding defense not waived when defendant "raised qualified immunity as an affirmative defense in his Answer, referenced the defense in the Pretrial Order, and gave testimony on the matter at trial"). Although the defense of qualified immunity provides public officials important protection from baseless and harassing lawsuits, it is not a parachute to be deployed only when the plane has run out of fuel. Defendants must diligently raise the defense during pretrial proceedings and ensure it is included in the pretrial order. "To find otherwise is to invite strategic use of the defense by defendants who stand to benefit from delay." *Guzman-Rivera* v. *Rivera-Cruz*, 98 F.3d 664, 668 (1st Cir. 1996). Because we reinstate portions of the first jury verdict, we need not address defendants' argument that the district court abused its discretion in denying their request to assert qualified immunity at the second trial.

> chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct.

Worrell v. *Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) (quotation and citation omitted).[10]

Parties do not dispute that plaintiffs engaged in protected First Amendment activity. Our review of the evidence from the first trial is thus limited to whether there was evidence of (1) "an injury that would chill a person of ordinary firmness from

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[10] We would normally evaluate plaintiffs' retaliation claim under the *Pickering/Connick* balancing test, which is applicable to parties who have a contractual relationship with the government. *See Bd. of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 673-78 (1996). In assessing whether a public employer has impermissibly infringed on an employee's speech rights, we apply the following test: "(1) whether the speech touches on a matter of public concern, (2) whether the employee's interest in commenting on matters of public concern outweighs the interest of the state in promoting the efficiency of the public service it performs through its employees, and (3) whether the protected speech was a substantial or motivating factor behind the adverse employment decision . . . . If these three factors are met, (4) the burden shifts to the employer to establish that it would have reached the same decision in the absence of the protected conduct." *Burns* v. *Bd. of County Comm'rs*, 330 F.3d 1275, 1286 n.7 (10th Cir. 2003). We applied this test when considering an earlier appeal from some of the parties in this case. *See Evans* v. *Fogarty*, 44 F. App'x 924, 929 (10th Cir. 2002). However, because the juries at both trials were instructed (albeit impermissibly, with the parties' consent) on the elements required to prove a First Amendment retaliation claim outside the public employment context, we apply those elements in this case.

continuing to engage in [protected] activity," (2) whether defendants caused that injury, and (3) whether defendants' actions were motivated by plaintiffs' protected activity. Worrell, 219 F.3d at 1212. As to the third issue, retaliatory motive, the district court found there was ample evidence of retaliatory motive in its order of July 9, 2003, and did not revisit this point in the new trial order. *See Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 5 (W.D. Okla. July 9, 2003) ("The Court has little difficulty in concluding there was sufficient evidence to create a jury question as to retaliatory motive."). Although defendants challenge this holding, we agree that there was sufficient evidence in the record for a jury to find retaliatory motive on the part of all three defendants. With respect to the causation and injury elements, we must examine the distinct patterns of retaliatory activity alleged by the plaintiffs to determine whether plaintiffs offered evidence as to any one pattern sufficient for a reasonable juror to find in their favor.

As we wade through the evidence presented at the first trial, we reemphasize the Seventh Amendment protections that underpin our inquiry, which provide that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. "Thus, under the Seventh Amendment, the court may not substitute its judgment of the facts for that of the jury; it may only grant a new trial if it concludes that the jury's verdict was so against the weight of the evidence as to be unsupportable." *Skinner* v. *Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988). It is also

worthy of mention that plaintiffs carried a burden to establish the personal participation of each defendant in the alleged retaliation; section 1983 liability may not be predicated on a respondeat superior theory. *See Butler* v. *City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993) ("A supervisor is not liable under 1983 unless an affirmative link exists between the constitutional deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise.") (quotation omitted).

A

Of the several patterns of retaliatory behavior alleged by plaintiffs at the first trial, the most thoroughly developed (and heavily contested) was their allegation that defendants directed OFMQ to approve fewer and lower value units for reimbursement, and to increase costly administrative burdens. In support of this allegation, plaintiffs offered their own testimony, the testimony of several third-party witnesses, and a set of data representing 25 months of reimbursement approvals for all private providers and CMHCs across the state. That data was compiled and analyzed by Roger Dale McDaniel, a certified public accountant who testified as an expert witness at the first trial. McDaniel analyzed monthly reimbursement data provided by Unisys Corporation, OFMQ's fiscal agent, for the months July 1999 through January 2002.[11]

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[11] Data from July through December 2000, and February 2001 was unavailable and was not provided.

For those months included in the Unisys reports, the data shows all units approved for each provider funded through OFMQ. McDaniel testified that, on average, the plaintiff providers (and some providers initially named as plaintiffs but later dismissed) were reimbursed at a lower rate per unit of service than CMHCs and non-plaintiff providers. Across this 25-month period, plaintiff providers were reimbursed at an average rate of $8.85 per unit, other private providers were reimbursed at an average rate of $18.13 per unit, and CMHCs were reimbursed at an average rate of $13.02 per unit (adjusted to $16.93 considering the 30 percent additional reimbursement provided to CMHCs). This disparity in average, across-the-board reimbursement rates was introduced as evidence of retaliatory injury and also as damages evidence with respect to the corporate plaintiffs.

Defendants did not object to McDaniel's qualifications to offer expert testimony on the Unisys data, but did challenge his methodology and conclusions on cross-examination. McDaniel admitted that his calculations represented nothing more than a simple average, not a mean or mode, and that he was unfamiliar with statistical methodologies. He also admitted that the Unisys data included only those units for which each provider was approved, and showed nothing about the quantity or type of units requested, or whether any individual provider even billed those units for which it was approved. He further admitted that, on average, plaintiff providers billed substantially more per client ($595.01) during that period than either

the CMHCs ($393.17)[12] or other private providers ($384.59).

Defendants moved for JMOL at the close of the plaintiffs' case, but did not raise specific objections to the disparity evidence at that time. As to Fritz, defendants stated:

> The testimony over and over and over again by various of the plaintiffs was that every time there was a budget problem at the Health Care Authority that such things as units were reduced or reimbursement rates were cut. But that applied to all private providers across the board. The unit cuts applied to CMHCs and private providers across the board. So what they have shown is that there was a budgetary motive and not a retaliatory motive on behalf of any of the plaintiffs [sic] in this case.

As to Fogarty and Brown, defendants did not mention the disparity evidence. In their motion for JMOL following the verdict, defendants focused on plaintiffs' failure to prove causation – *i.e.*, lack of evidence to prove Fritz or Fogarty exerted any control over OFMQ approvals – but said little about the validity of the disparity evidence as proof of retaliatory injury. In their renewed motion for JMOL or, alternatively, a new trial, defendants discussed the disparity evidence with respect to lost

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[12] This figure does not include the premium paid CMHCs to cover administrative costs.

profit damages, but only briefly touched on whether the disparity evidence could go toward retaliatory injury.

Nonetheless, in its July 9, 2003 order denying JMOL in part, the district court addressed several weaknesses of the disparity evidence in substantially greater detail than found in the defendants' motions for JMOL. It then explicitly referenced that discussion[13] in the new trial order, finding that the disparity evidence was insufficient to support a First Amendment retaliation claim as to any of the defendants. The court concluded that the evidence tending to show liability was "extraordinarily thin." *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 3 (W.D. Okla. Aug. 25, 2003). With respect to damages, the court found that "[t]he jury's formulaic allocation of damages between each of the defendants was also troublesome." *Id.* at 5. It determined that the corporate plaintiffs' damages awards were unsupported by the evidence, because they were based on a measure of lost revenues as opposed to lost profits. Individual plaintiffs'

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[13] The concerns addressed in the July 9, 2003 order include: (1) variance in reimbursement rates depending on the service provided, (2) lack of evidence showing plaintiff providers requested the same units as other providers, (3) lack of evidence as to uniformity of patient populations, (4) lack of evidence that approved units were in fact used/billed, (5) lack of "comparable statistical evidence regarding the relative reimbursement rates for the period prior to plaintiffs' political activities," and (6) evidence that disparities in reimbursement rates were of concern to plaintiffs even before 1999. *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 7 (W.D. Okla. July 9, 2003)

damages awards, which ranged from $295,000 to $1.5 million, were deemed excessive.

Although, as discussed *infra*, we share the district court's concerns about the corporate damages awarded at the first trial, we hold that it abused its discretion in granting a new trial. Taken in the context of all other evidence produced at trial, a reasonable juror could have found both retaliatory injury and causation. In its discussion of this evidence in the July 9, 2003 and new trial orders, the district court improperly intruded on the jury's primary role as factfinder and substituted its own judgment for that of the jury.

Our review of the evidence admitted at the first trial satisfies us that a reasonable juror could have found Fogarty and Fritz caused OFMQ to approve fewer and/or lower value units. Recognizing that "[i]ndividual liability under § 1983 must be based on personal involvement in the alleged constitutional violation," *Foote* v. *Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997) (citation omitted), there was sufficient evidence of Fritz and Fogarty's personal control over OFMQ to establish causation.

Fogarty testified via deposition that "we directly control [OFMQ] as a contractor" and "we write the terms of the contract and they agree to it." Charles Parkhurst, owner of DFS, testified that he spoke with Fogarty regarding certain units that Parkhurst felt were unfairly denied by OFMQ. According to Parkhurst, Fogarty agreed that the units should be restored, and that he would personally resolve the issue with a phone call to OFMQ. When asked whether Fogarty indicated that "with a simple phone call to OFMQ he could control your units," Parkhurst

replied, "Yes. That's what he told me." In fact, the contract in place between OHCA and OFMQ during this period provides for relatively close supervision of the OFMQ approval process by OHCA:

> The parties agree to discuss at a minimum of one weekly meeting any problems or concerns relating to [prior authorization] services.
>
> OFMQ agrees to provide a half time data analyst to assist the OHCA and the OFMQ prior authorization program in analyzing and studying utilization patterns of providers and recipients of outpatient behavioral health services.

By contrast, there is no provision in the contract for OFMQ's independence with regard to prior approval of reimbursement plans.

Fritz testified that she spoke with OFMQ staff regularly, and that when an individual provider raised a concern, she would occasionally call OFMQ to discuss what happened in that particular instance. OHCA Finance Director Deborah Ogles testified that Fritz was the "go-between" between OFMQ and senior executives at OHCA. OFMQ's Outpatient Behavioral Health Manager, Kirk Nicholson, testified that Fritz was his principle contact within OHCA, and that he touched base with her once per week. John Majors testified that he witnessed Fritz kick an OFMQ employee under the table during a meeting to indicate that a provider's question was best left to her.

Moreover, there was evidence suggesting that Fritz, and to a lesser extent Fogarty, had an

exquisite understanding of the relationship between the unit mix approved by OFMQ and overall outlays for behavioral and mental health services. For example, in an April 7, 1999 letter from Fritz to Sean Black discussing the potential cost impact of House Bill 1075, Fritz wrote:

> The assumption is that if the providers are able to use their bachelor trained employees to provide the more expensive counseling services instead of the lesser reimbursed rehab services there will be a significant tendency to do so. . . . If HB1075 were enacted the OHCA could anticipate very little use of the Individual Rehab treatment and continuing high use of the counseling units.

In a memo laying out what plaintiffs refer to as the "four point plan," Fritz describes OFMQ's role as "slow[ing] down" the growth of private provider services, and states that downward adjustment of rates was intended to "eliminate providers and services." By crediting these statements, a reasonable juror could surely draw the inference that Fritz and Fogarty exercised tight supervisory control over OFMQ and closely tracked private provider reimbursements.

Coupled with other evidence adduced at trial, jurors could also reasonably rely on the disparity evidence as proof of retaliatory injury. Plaintiff providers testified that they serviced the same population of patients as CMHCs and other private providers. Charles Parkhurst testified to fairly regular movement of patients back and forth

between DFS and a nearby CMHC. Several third-party witnesses corroborated that testimony. Linda Coffman, a licensed professional counselor at SOFS, testified that she could discern no difference between the patient population she serviced at her prior employer, a local CMHC, and that serviced by SOFS. Michael Elder, an attorney and one-time consultant to OHCA, testified that the services provided by CMHCs and private providers were "all the same." Nicholson testified that "[t]he same type of services as far as what they can provide are available between the two different – the privates and public facilities."

Although plaintiffs did not produce pre-1999 data, and thus could not show that the reimbursement disparity widened after they formed the Association, jurors could have relied on plaintiffs' testimony that the number and type of units approved changed after they began lobbying. Mary Parkhurst testified that she noticed a change in OFMQ treatment approvals at DFS in late 1999 through early 2000. Evans testified that after the Association began lobbying at the Capitol, "OFMQ got a little tougher to deal with." John Majors testified that in the Spring of 1999, "when we began to really speak out and ask for accountability OFMQ began to crack down and adjust. And almost like clockwork, when there would be a big issue at the capitol . . . my therapists would say sounds like you all spoke out today, because we're getting rejections, lowering units, major adjustments to our treatment plans." Neal Thrift testified that soon after the Association began lobbying, "we [were] not given as many units for the counseling services." Charles

Parkhurst testified that in 2000, "[w]e started getting a lot of modifications downward. We started getting a lot of requests for information. We got more technical denials. It turned into a nightmare."

Furthermore, there was at least some evidence that OHCA increased administrative burdens on plaintiff providers during this period. Holcomb testified that soon after joining the Association he noticed a delay in prior approvals. He also testified that during the process of getting Commission on Accreditation of Rehabilitation Facilities ("CARF") accreditation for JCH, one of the auditors spoke with someone at OHCA. Immediately thereafter, the auditors at his facility identified new problems. He further testified to receiving a call from Fritz telling him that he had not been accredited, before he himself had been notified of that fact by CARF.

Jurors could also have drawn the rational inference that plaintiff providers had an incentive to request higher value units, and did in fact request such units. William Schmid, a clinical psychologist, testified that the private providers worked off of a fixed cost base, and thus had a strong incentive to keep their clinicians providing therapy, and, ideally, higher value units of service. "[Y]ou really can't make up a loss on volume. I've tried; it doesn't work."

None of this is to refute the validity of the district court's concerns with respect to the admittedly imperfect disparity evidence derived from the Unisys data and testified to by McDaniel. Viewing the trial record as whole, a reasonable juror could conclude that Fogarty and Fritz moved aggressively in response to a severe budget crisis,

but that all policy changes designed to reign in costs applied to private providers across the board, and that they did not have the means to target the plaintiff providers even if they wished to. Yet a reasonable juror could also come to the opposite conclusion – that Fogarty and Fritz were persistently hostile to the plaintiff providers, whom they viewed as damaging to OHCA's interests, and used their authority to single out plaintiff providers for discriminatory treatment. Accordingly, the district court abused its discretion in taking that determination away from the jury.[14]

B

Plaintiffs argued that in addition to directing OFMQ to scale back on reimbursements to plaintiff providers, defendants used their authority to increase the number and intrusiveness of OHCA

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[14] In many ways, comparing this case to our decision in *Butcher* v. *City of McAlester*, 956 F.2d 973 (10th Cir. 1992), is instructive. In that case we reviewed the district court's denial of judgment notwithstanding the verdict to several city employees in a § 1983 First Amendment retaliation suit brought by members of a local firefighters' union. Defendants argued that much of the evidence was circumstantial and speculative, and that little if any evidence went to personal participation. *Id.* at 976-77. We upheld the judgment in favor of the plaintiffs, noting that "in a § 1983 proceeding circumstantial evidence generally plays a major role." *Id.* at 978. We further noted that the evidence, circumstantial though it may have been, was set against a backdrop of "intense emotional conflict between the City and Local 2284." *Id.* Similarly, in this case there was ample evidence of a poisonous, long-running political battle between plaintiffs and defendants, and that backdrop was insufficiently accounted for in the district court's piecemeal treatment of plaintiffs' disparity evidence as well as other evidence presented at trial.

audits of their facilities. They also alleged that OHCA demanded larger recoupments of previously billed services after they began lobbying at the Capitol. The SURS unit at OHCA was responsible for identifying suspicious and potentially fraudulent billing at numerous Medicaid-funded facilities, including those providing behavioral and mental health services. Webb, SURS's Director, testified that her unit's audit decisions were based on a combination of referrals and objective criteria run through a statistical program to spot suspicious billing patterns. Webb, Fritz, and Fogarty all denied that any audits performed by the SURS unit were retaliatory.

In its discussion of this evidence in the July 9, 2003 order, the district court found the retaliatory audit evidence sufficient to create a jury question, albeit barely:

> Evidence as to the timing and severity of [OHCA]'s audits of plaintiffs, taken in the light most favorable to plaintiffs and giving them the benefit of all reasonable inferences, might support an inference that some aspect of the audits was retaliatory. Any evidence suggesting such retaliation was purely circumstantial though and, as with the evidence relating to other instances of claimed retaliation, extraordinarily thin.

Evans v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 12 (W.D. Okla. July 9, 2003). The court did not revisit this alleged pattern of retaliation in its new trial order, in part because it found that the jury's

damages awards at the first trial must have hinged on the disparity evidence.

Although we share the district court's skepticism about the evidence offered with respect to retaliatory audits, a reasonable juror could have found for Charles and Mary Parkhurst and their facility, DFS, as against Fritz based on the evidence presented. Mary Parkhurst testified that DFS was audited by the SURS team in March 2002, and that she received an unusually large recoupment request, amounting to $16,000, soon thereafter. Charles Parkhurst testified that the basis for the recoupment decision was never explained to him. Fritz admitted that she complained to the SURS unit about DFS. This evidence, taken in conjunction with testimony showing the contentious relationship of the parties, could lead a reasonable juror to conclude that Fritz personally participated in the decision to audit DFS and that her motive in making that referral was retaliatory.

With respect to the remainder of the audit evidence, it was simply too speculative to prove personal participation or causation as to any of the defendants. Evans testified that immediately after serving an open records request he was hit with two unusually invasive audits of his facility, SOFS. He also testified that he received the results from those audits unusually quickly, and that the result of a November 27, 2000 audit was hand-delivered. Yet in light of overwhelming evidence of multiple problems at SOFS, undisputed evidence that OHCA received several referrals from employees of SOFS, and the lack of any evidence linking any of the defendants to the SOFS audits, no reasonable juror could have

found for Evans or SOFS on this basis. Audit-related testimony from Neal Thrift and John Majors was also speculative and could not form a basis for liability.

C

In addition to the audit and disparity evidence, plaintiffs introduced evidence at the first trial that defendants had blocked plaintiff providers from receiving their share of two supplemental appropriations approved by the Oklahoma state legislature in early 2000. The first appropriation amounted to $500,000, and was passed in February 2000; the second, amounting to $1.1 million, was passed in March 2000. Considering federal matching funds, these appropriations provided $5.2 million in additional funding. In its July 9, 2003 order, the district court found that the evidence relating to the supplemental appropriation created a jury question on plaintiffs' claim:

> Plaintiffs testified that, although they were successful in obtaining passage of the supplemental appropriation, none of them received any restored units. Defendant Fritz testified that restoration of units was done on a case-by-case basis, depending apparently on whether it was requested in a particular case. It was unclear from plaintiffs' evidence whether plaintiffs sought such restorations and were denied them, or whether they simply assumed the restorations would be across the board and therefore did not pursue reimbursements in each affected case.

> However, considering the evidence in the light most favorable to plaintiffs and drawing all reasonable inferences therefrom, the Court concludes the evidence was sufficient to create a jury question as to whether, in some fashion, defendants Fogarty and/or Fritz retaliated against plaintiffs by somehow denying them any portion of the units restored by the supplemental appropriation.

Evans v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 8-9 (W.D. Okla. July 9, 2003). We agree that the supplemental appropriation evidence created a question of fact for the jury and that a reasonable juror could have found against Fritz and Fogarty on this basis.

Several of the plaintiffs, including Nancy Graves-Thrift, Evans, John Majors, and Wheeler, testified that none of the supplemental appropriation was allocated to their facilities via restoration of units previously cut. They alleged that this funding, which was allocated to the OHCA general fund, was withheld from them in retaliation for their political activities. This testimony is supported by a letter from State Senator Cal Hobson to Fogarty, dated August 22, 2000. That letter reads in part:

> The case has been convincingly made to me that despite a formal restoration in the maximum number of allowable services, in practice [OFMQ] has been systematically and almost universally rejecting requests to authorize services back up to the traditional levels.

> Instead, they have been holding patients at or below the reduced limits set while the cuts were in place.

Other evidence, in addition to the Hobson letter, showed that this was a matter of heated dispute between OHCA and the Association, and that the Association met with Fogarty on the issue. At this meeting Fogarty said OHCA would not support the supplemental appropriation.

With respect to causation, Wheeler testified that Fogarty assured him he would look into the restoration of units at Wheeler's facility, and assured him the money would find its way into the providers' pockets. Fritz testified that the supplemental appropriation resulted in restoration of units to providers, but that those units were restored "on a case-by-case basis." In light of other evidence in the record, including evidence that Fritz and Fogarty supervised OFMQ approvals to private providers, a reasonable juror could find against Fritz and Fogarty on the basis of this evidence.

Plaintiffs alleged a fourth pattern of retaliation, specific to SOFS. They claimed that SOFS' Medicaid contract was terminated in January 2001 in retaliation for Evans' political activities. Specifically, plaintiffs alleged that Fritz and Fogarty retaliated against Evans by terminating his contract soon after Evans sent Fogarty a disclosure request under the Open Records Act. See Okla. Stat. tit. 51, § 24A. Evans sent that request on November 22, 2000. He received a letter from Fritz dated January 8, 2001, notifying him that his contract had been terminated. The district court found in its July 9, 2003 order that there was sufficient evidence on this question to

create a triable issue of fact for the jury: "Finally, the evidence showed the medicaid contract of [SOFS] was not renewed, which is actionable, adverse action as to it." *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 12 (W.D. Okla. July 9, 2003). The record includes evidence showing problems at SOFS. Evans hid his involvement with SOFS in violation of both OHCA rules and his Medicaid contract. It is also fairly clear there were persistent billing problems at SOFS facilities. However, we agree that a reasonable juror could have found the termination retaliatory.

There was ample evidence from which a reasonable juror could conclude that Evans' political activities were irritating to Fritz and Fogarty. Multiple communications reveal the battle Evans waged with OHCA and several OHCA documents demonstrate that OHCA paid close attention to SOFS. Furthermore, some evidence suggested that Fritz and Fogarty were personally involved in the termination decision. An internal OHCA document showed that Fogarty was personally involved in a decision to hold SOFS' termination in abeyance following a state representative's request to keep SOFS' facilities open. Accordingly, a reasonable juror could have found the termination decision to be retaliatory.

E

Plaintiffs expended substantial time at the first trial offering evidence of allegedly hostile, defamatory, and threatening comments made to individual plaintiffs by Fogarty and Brown. The district court relied on this evidence to deny JMOL to Brown and Fogarty as to all individual plaintiffs

except Holcomb (who did not actively lobby before the state legislature), relying on *Suarez*. It recognized that federal courts have historically been chary of extending § 1983 liability to defamation, *see Paul* v. *Davis*, 424 U.S. 693, 702 (1976), but held that a § 1983 claim may succeed if defamation is "coupled with some threat, sanction or similar retaliatory action." *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 12 (W.D. Okla. July 9, 2003). Without reaching the question of whether we find *Suarez* persuasive, we discern no basis in the record for holding Fogarty or Brown liable because of their comments to plaintiffs.

Nancy Graves-Thrift testified that, while she was in a public restroom at the state Capitol, Brown said: "[Y]ou all are wasting your time here. These people can't help you. We can help you. You're just making my job harder." She further testified that Fogarty said to her, "[Y]ou're not helping me, you're hurting me." Finally, she testified that she witnessed Brown "flip off" John Majors (testimony which Majors corroborated). Charles Parkhurst testified that while he stood outside a committee room at the Capitol, Fogarty asked him, "What can we do to make [House Bill] 1075 go away?" Cynthia Majors testified Fogarty threatened that if her husband John Majors continued to lobby at the Capitol, "he could send someone down to investigate [her] nursing home for fraudulent billing." Gerrol Adkins, Cynthia Majors' father, corroborated her testimony on this point. John Majors testified that he attended a meeting with Fogarty and various state legislators at which Fogarty labeled the members of the Association "frauds and crooks." Finally, Evans

testified that he spoke to Fogarty on the phone while at the Capitol and Fogarty asked, "Do you think you could talk to your group and see if you could get them to stop trying to get this House Bill 1075 passed?"

In *Paul*, the Court held that injury to reputation, alone, is insufficient to establish a deprivation of a plaintiff's Due Process rights. 424 U.S. at 712. Rather, plaintiffs must show that a "right or status previously recognized by state law was distinctly altered or extinguished." *Id.* at 711; *see also Siegert* v. *Gilley*, 500 U.S. 226, 234 (1991). Accordingly, defendants' comments, even if defamatory or hostile, cannot form the basis for a § 1983 action absent some ancillary change in plaintiffs' status (*i.e.*, injury), which plaintiffs failed to demonstrate. *See Hardeman* v. *City of Albuquerque*, 377 F.3d 1106, 1118-19 (10th Cir. 2004) ("We have never found a First Amendment violation on the basis of disparaging comments alone.").

On the other hand, threats of official sanctions aimed at discouraging protected activity can form the basis of a constitutional violation. *See Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 67 (1963). Yet no reasonable juror could find that any of the alleged comments, with one possible exception, could constitute a threat that would "chill a person of ordinary firmness." *Worrell*, 219 F.3d at 1212. Nor is *Suarez* on point. In that case a defendant told plaintiffs that it would "become his mission to cause as much pain, damage, and injury as possible to [them]." 202 F.3d at 680. He further threatened that he would "inflict the maximum degree of penalty" if plaintiffs refused to agree to a temporary injunction.

Id. While the statements alleged to have been made by defendants in this case evince a level of discourse that falls well short of our public ideals, none of the comments are analogous to the specific threats at issue in *Suarez*.

The one possible exception to this analysis is the alleged threat made by Fogarty to Cynthia Majors. While we are skeptical that the phone call between Fogarty and Cynthia Majors could be construed as an "imminent [threat of] adverse regulatory action," *see Blankenship* v. *Manchin*, 471 F.3d 523, 529 (4th Cir. 2006), we need not reach the issue. The jury could have imposed liability on Fogarty with respect to Cynthia Majors and her facility, Morning Star, based on the other alleged patterns of retaliation. *See* Part III.A *supra*. Cynthia Majors' membership in the Association includes her in the group of plaintiffs that have established political activity on the facts of this case. Evidence of causation and injury are discussed above.[15]

Accordingly, we conclude it was error for the district court to deny JMOL to Brown as to all plaintiffs following the first trial. The district court based its denial to Brown on her comments labeling some of the defendants "crooks" and "frauds," holding that "[s]uch comments, if made, arguably go beyond

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[15] Defendants argue on appeal that Oklahoma's two-year statute of limitations for § 1983 claims, see Okla. Stat. tit. 12, § 95, bars recovery on the basis of the Cynthia Majors call, because that call occurred in March 1999. Because defendants did not raise this defense below, however, we consider it waived. *See Malandris* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 152, 1171-72 (10th Cir. 1981).

the scope of that which the First Amendment protects." *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 11 (W.D. Okla. July 9, 2003). Yet for the reasons stated above, such comments are at most defamatory, and do not, standing alone, provide a basis for recovery in a § 1983 action.[16] As to the other patterns of retaliation discussed in the preceding sections, plaintiffs offered no evidence that Brown had any authority with respect to OFMQ or the SURS unit, or that she personally participated in that retaliatory activity. Plaintiffs' claims against Brown are unsupported by the evidence, and are properly dismissed as a matter of law.[17]

IV

Defendants argue that even if the evidence at the first trial were sufficient to support a finding of liability, damages to both the corporate and individual plaintiffs were "so excessive as to shock the judicial conscience and to raise an irresistible

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[16] We take no position on whether the terms "crooks" and "frauds," used in this context, were in fact defamatory, as opposed to words of general disparagement or abuse. We also note, for the sake of clarity, that the evidence is ambiguous as to whether these remarks were attributed to Brown or Fogarty.

[17] Plaintiffs argue that Brown waived her challenge to the denial of JMOL after the first trial by insufficiently specifying the grounds for JMOL in her Rule 50(a) motion. Although plaintiffs' response to Brown's motion for JMOL took issue with Brown's testimony on many grounds, including her "flagrant disregard for the truth and constant willingness to say anything to promote half truths or non-truths," it says nothing in regard to preservation of this issue. Therefore plaintiffs may not now argue waiver on the part of Brown, having waived this objection themselves. *See Guides, Ltd.* v. *Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1076 n.3 (10th Cir. 2002).

inference that passion, prejudice, corruption or improper cause invaded the trial," *see Fitzgerald* v. *Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1261 (10th Cir. 1995), and, in the case of the corporate plaintiffs, without any economic basis.[18] The amount of damages awarded at the first trial, both to the corporate and individual plaintiffs, was a matter of concern to the district court, and was a key factor in its granting a new trial. *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 3 (W.D. Okla. Aug. 25, 2003) ("The sufficiency of the evidence to support the damages awarded in this case is also central to the Court's conclusion that a new trial must be ordered."). The court primarily took issue with the awards to the corporate plaintiffs, finding the jury's allocation of damages to be "formulaic,"[19] and further

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[18] Both Fritz and Fogarty limit their specific damages challenges to the second trial verdict. Fogarty's entire argument in his principal brief with respect to the damages awarded at the first trial is a paragraph addressing the propriety of the new trial order, not the awards themselves. Fritz's argument on this point in her principal brief is similarly skeletal – she devotes all of four lines to the matter, none of which preserve specific objections or mention specific plaintiffs. This would normally constitute waiver as to the damages awarded at the first trial. *See Adler* v. *Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived."). Nevertheless, in light of the unusual procedural posture of this case and the similarity between the first and second trial damage awards, we will consider this issue preserved. *See Sussman* v. *Patterson*, 108 F.3d 1206, 1210 (10th Cir. 1997) (holding that the "general waiver rule is not absolute, . . . and we may depart from it in our discretion") (alteration omitted).

[19] Insofar as the district court found that the allocation of individual damages between the defendants raised an inference that passion or prejudice infected the first trial verdict, we note (...continued)

finding that the awards could not be supported by any plausible measure of lost profits. *Id.* at 5. It also deemed the individual damages awards to be "plainly excessive." *Id.* at 6.

Our review of a jury's findings with respect to damages is limited to whether they are supported by substantial evidence. *Dodoo* v. *Seagate Tech., Inc.*, 235 F.3d 522, 531 (10th Cir. 2000). "[A]bsent an award so excessive or inadequate as to shock the judicial conscience and raise an irresistible inference that passion, prejudice or another improper cause invaded the trial, the jury's determination of the amount of damages is inviolate." *Id.* (quotation and alteration omitted). When an appellate court concludes a damages award was erroneously excessive, but that no error tainted the jury's finding of liability, it may order a remittitur or direct a new trial. *See Malandris*, 703 F.2d at 1168. With these standards in mind, we turn first to the individual plaintiffs' awards, and then to the corporate plaintiffs' awards.

A

1

In the first trial, the jury awarded Evans $300,000 in compensatory damages as against Fogarty and $150,000 as against Fritz. These sums appear to be at the upper range of emotional damages upheld in this circuit, *see Dodoo*, 235 F.3d at 532 (affirming emotional damages in the amount

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that that allocation of liabilities does not shock the conscience of this court upon review of the evidence.

of $125,000); *Smith* v. *Nw. Fin. Acceptance, Inc.*, 129 F.3d 1408, 1416 (10th Cir. 1997) (affirming emotional damages in the amount of $200,000), but on our review of the record, we cannot say that they shock the judicial conscience. Evidence presented at trial allowed the jury to find that Fritz and Fogarty acted to terminate Evans' Medicaid contract, effectively putting him out of business. Evans took the lead for the Association in filing a disclosure request with the OHCA, and some evidence suggested that Evans suffered targeted retaliation as a result of that request. Moreover, Evans testified to engaging in a long-running battle with OHCA officials to keep his facilities open. He stated that his struggles to keep open SOFS facilities left him with a large personal debt, caused him substantial stress over a number of years, and caused him to lose 25-30 pounds. Such testimony supported a finding that he lived in constant fear of retaliation by OHCA against his business.

Contrary to defendants' suggestion, there is no rule in this circuit requiring corroboration of a plaintiff's testimony to support an emotional damages award. *See, e.g.*, *Dodoo*, 235 F.3d at 532; *compare Koopman* v. *Water Dist. No. 1*, 41 F.3d 1417, 1420 (10th Cir. 1994) (denying emotional damages when no witness testimony corroborated plaintiff's mental state, and circumstances afforded no basis to infer stress was caused by a recoverable injury). Nor do we accept Fogarty's argument that Evans' testimony referred solely to economic concerns – rather, Evans' testimony went to emotional distress caused by Fritz and Fogarty's retaliation and was sufficient to support an award of emotional damages.

As to the district court's finding that *Wulf* v. *City of Wichita*, 883 F.2d 842 (10th Cir. 1989), set a $50,000 "guidepost" for emotional distress damages, that conclusion misreads our holding. In *Wulf* we reduced an emotional damages award of $250,000 to $50,000 in a First Amendment retaliation case in which the retaliatory injury was the loss of the plaintiff's job. *Id.* at 875. Nothing in *Wulf* contradicts the basic principle that a jury's damages award is highly specific to the facts and circumstances of the case. More generally, it bears repeating that compensation in cases involving constitutional rights should not be approached in a miserly fashion. "It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right." *Foster* v. *MCI Telecomms. Corp.*, 773 F.2d 1116, 1121 (10th Cir. 1985). Under that relatively generous standard, and carefully considering the facts of this case, we cannot say that the jury's compensatory damages award to Evans shocks the judicial conscience.

2

The jury awarded Wheeler $177,000 in compensatory damages against Fogarty and $88,500 in compensatory damages against Fritz. This award finds no basis in the record. Wheeler did not testify that he suffered any emotional distress, nor could any other evidence introduced at trial support an inference that he suffered such distress. Accordingly, Wheeler failed to prove compensable injury as to any of the defendants, and only nominal damages were appropriate. *See Lippoldt* v. *Cole*, 468 F.3d 1204, 1220-21 (10th Cir. 2006) (upholding

district court award of nominal damages in a § 1983 action due to plaintiffs' failure to prove compensable injury). We remand the verdict in favor of Wheeler with directions that the trial court enter a remittitur order for acceptance of a judgment of $1 in nominal damages against Fogarty and $1 in nominal damages against Fritz.

3

As to the remaining individual plaintiffs, the jury awarded compensatory damages ranging from $450,000 (Cynthia Majors) to $1,350,000 (Neal and Nancy Thrift, individually).[20] With the exception of the Cynthia Majors award, all other individual plaintiffs were awarded at least $900,000. Although all of those awards are supported by at least some evidence that the plaintiff receiving the award suffered emotional distress, we conclude these awards are so excessive as to shock the judicial conscience, and that remittitur is appropriate. As stated *supra*, our discretion to review jury awards is limited, and our approach is necessarily deferential. Nevertheless, even recognizing the unusual circumstances of this case and the threat defendants posed to plaintiffs' livelihoods, the jury's awards to the remaining individual plaintiffs so far outpace emotional damages awards sanctioned in this and other circuits that we are compelled to order remittitur.

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[20] These amounts are net of any damages awarded against Brown.

There is precedent in this circuit for an appellate panel to actually set the amount of the remittitur. *See Malandris*, 703 F.2d at 1178; see also 11 Wright et al., Federal Practice and Procedure: Civil 2d § 2820 ("If the appellate court concludes that the verdict is excessive, it need not necessarily reverse and order a new trial. It may give plaintiff an alternative by ordering a new trial unless plaintiff will consent to a remittitur in a specified amount."). That is the resolution sought by plaintiffs in the event we were to reinstate some or all of the compensatory damages awarded at the first trial. We deny that request.

Notwithstanding our authority to do so, we are reluctant to invade the province of the trial court in setting a remittitur amount, as the panel did in *Malandris*. The district court has heard all of the evidence, and is in a better position to select the amount of an appropriate remittitur than is this panel. A jury has twice awarded compensatory damages to the individual plaintiffs, and the district court has heard all of that evidence. Having reviewed the record, which is more than 16,000 pages in length, we are convinced that the amount of remittitur should not be so small as to amount to no award at all, nor that the reduction as to any individual plaintiff be unreasonable. There are not many cases in this circuit to guide the district court on this point, but we do note that the panel's reduction in *Malandris* was two-thirds.

Yet we must qualify our holding with respect to two of the remaining individual plaintiffs – Cynthia Majors and Mary Parkhurst. The only evidence which could support an award of emotional damages

in favor of Cynthia Majors was her testimony regarding the Fogarty phone call, and John Majors' testimony that defendants' retaliation had damaged their marriage. Moreover, it was undisputed that Cynthia Majors played a minor role in the Association's lobbying activities and had no role in the day-to-day operation of Morning Star. Her threadbare testimony is quite similar to the plaintiff's testimony in *Wulf*. Like the court in that case, "we agree with defendants that [although plaintiff's] testimony and the evidence presented are not the most graphic and detailed display of emotional and mental anguish and distress, we cannot conclude that some award for such anguish and distress is unsupported by substantial evidence." 883 F.2d at 875. Accordingly, the standard of reasonableness with respect to the Cynthia Majors award may counsel a reduction greater than that in *Malandris*.

We reach the same result with regard to the jury's emotional damages award to Mary Parkhurst. She offered testimony that was tangential, at best, to the issue of emotional distress: "Well, I have gray hair now. And it does make – it's very stressful. And I tell you, I feel like a little mouse backed off in a corner with a big cat sitting up there grinning at me ready to pounce any time. That's how we feel because of the threat that we feel. All the time we live with that fear." Like Cynthia Majors' testimony, this evidence is simply too thin to support a large award for emotional distress. Accordingly, the standard of reasonableness with respect to the Mary Parkhurst award may also counsel a reduction greater than that in *Malandris*. With respect to all

individual plaintiffs we hold, like the Malandris panel, that they are free to accept the remittitur ordered by the district court or, in the alternative, to pursue a new trial as to all issues, including liability. *See* 703 F.2d at 1178.

B

Following the jury's verdict in favor of all plaintiffs and against all defendants on liability and compensatory damages, plaintiffs sought punitive damages against all defendants in a second-stage proceeding. Evans, Nancy Graves-Thrift, and John Majors testified during the punitive damages stage, as did Brown, Fritz, Fogarty, and Mitchell. The jury subsequently awarded punitive damages in the amount of $50,000 in favor of all individual plaintiffs against all defendants, for a total punitive damages award of $1,350,000. Defendants challenge these awards as unsupported by the evidence, but do not argue that the amount of the awards constitutes a Due Process violation. *See, e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003). The district court did not mention the jury's punitive damages awards in the new trial order or in its July 9, 2003 order, but vacated these awards along with all others by granting defendants a new trial.

Punitive damages are available in § 1983 actions, but the burden of proof with respect to punitive damages is higher than that required to find liability. Such damages are only available "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. The focus must be on whether the defendant's actions call for deterrence and

punishment over and above that provided by compensatory awards." Hardeman, 377 F.3d at 1121. As with the other damages awards, we review the sufficiency of the evidence de novo, and examine the evidence in the light most favorable to the plaintiffs. *Nieto* v. *Kapoor*, 268 F.3d 1208, 1221 (10th Cir. 2001). We note, however, that we are without the district court's views on the matter.

Nevertheless, we are satisfied that a reasonable juror could conclude that Fritz and Fogarty acted with "reckless or callous indifference," if not "evil motive or intent," to the rights of the defendants. *Hardeman*, 377 F.3d at 1121. Plaintiffs met with persistent hostility from Fritz and Fogarty, and were subject to a wide variety of injuries in retaliation for their political activities. A reasonable juror could conclude, based on the evidence before it, that Fogarty and Fritz wanted to silence members of the Association, were embarrassed by their lobbying efforts, and acted to starve them of Medicaid funding in an effort to put them out of business. This type of behavior is the sort that is properly answered by punitive damages, which act "to punish what has occurred and to deter its repetition." *Youren* v. *Tintic Sch. Dist.*, 343 F.3d 1296, 1309 (10th Cir. 2003). Although defendants cite to *Fuerschbach* v. *Southwest Airlines Co.*, 439 F.3d 1197 (10th Cir. 2006) as analogous to the facts at issue here, we are unconvinced. Defendants conduct in that case, which we described as a "joke gone bad,"[21] *see id.*

[21] In that case, the plaintiff's fellow employees convinced two Albuquerque police officers to conduct a mock arrest of plaintiff as a practical joke. *Id.* at 1201-02.

1200, is a far cry from defendants' conduct in this case. Accordingly, we reinstate the punitive damages awarded at the first trial against Fogarty and Fritz in favor of all plaintiffs.

C

Finally, we review whether the evidence was sufficient to support the jury's award of compensatory damages to the corporate plaintiffs. These damages amounted to $24 million – $6 million to SOFS, $6 million to Morning Star, $6 million to Rustling Winds, $2 million to JCH, $2 million to DFS, and $2 million to Serenity Springs. As with the individual damages, liability was allocated on a 60/30/10 basis between Fogarty, Fritz, and Brown. Total corporate damages, as well as the allocation of damages between the corporate plaintiffs, were consistent with plaintiffs' counsel's suggestion at closing. That request was itself based, loosely, on McDaniel's testimony. McDaniel's corporate damages calculation represented: (1) the difference between the average per unit reimbursement rate paid to the plaintiff providers and all other private providers during the relevant period, (2) multiplied by the average number of units billed by all plaintiff providers per month, (3) multiplied by the number of months between the beginning of plaintiffs' lobbying efforts and the filing of the Rustling Winds lawsuit, (4) plus interest.

Before the district court, defendants argued that McDaniel's calculations did not provide a plausible estimate of the profits lost as a result of defendants' retaliation. This precise issue was at the heart of the district court's justification for granting a new trial: "Here, plaintiffs made no effort to quantify the

economic losses of each corporate plaintiff." *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 4 (W.D. Okla. Aug. 25, 2003). We agree that while plaintiffs' evidence was sufficient for a jury to find liability for the corporate plaintiffs against Fritz and Fogarty, their offering of proof as to the corporate damages was woefully insufficient. Moreover, we agree with the district court that remittitur is inappropriate as to the corporate damages, "there being no apparent basis in the evidence for setting some lesser amount of damages." *Id.* at 9.

Recognizing that there have already been two trials addressing damages in this case, we nevertheless conclude with great reluctance that a third trial on damages is necessary. Given that the juries in the first and second trials reached different conclusions as to defendants' liability and as to which plaintiffs prevailed, the corporate damages awards from the second trial are not applicable to the first. *See Wilson* v. *Burlington N. R.R. Co.*, 804 F.2d 607 (10th Cir. 1986) (reversing grant of new trial and reinstating first jury's verdict where second jury reached different conclusions as to liability of parties); *Diamond Shamrock Corp.* v. *Zinke & Trumbo, Ltd.*, 791 F.2d 1416 (10th Cir. 1986) (reinstating first jury's verdict where prevailing parties differed). We therefore exercise our authority to order a new trial limited solely to corporate damages. *See Malandris*, 703 F.2d at 1168.

Plaintiffs' arguments in favor of reinstatement of the corporate damages awards are unpersuasive. They correctly identify precedent establishing that we do not demand precision in our review of a jury's award for economic damages. *See, e.g., Bitler* v. *A.O.*

Smith Corp., 400 F.3d 1227, 1242 (10th Cir. 2004) (upholding an award for future medical expenses that was "not based on specific and substantial evidence"); *Fiedler* v. *McKea Corp.*, 605 F.2d 542, 547 (10th Cir. 1979) ("[M]athematical exactness is not required."). Yet McDaniel's economic loss calculation was not simply imprecise – rather, it had the air of fantasy.

We reemphasize that "[t]he purpose of § 1983 damages is to provide compensation for injuries caused by the violation of a plaintiff's legal rights. No compensatory damages may be awarded absent proof of actual injury." *Jolivet* v. *Deland*, 966 F.2d 573, 576 (10th Cir. 1992) (citation omitted). "Although damages for lost business opportunities need not be supported by mathematical certainty, they must be based on reasonable proof. Amounts that are speculative, remote, imaginary, or impossible of ascertainment are not recoverable." *Fitzgerald*, 68 F.3d at 1264 (quotation omitted). In order for a juror to accept McDaniel's lost profits calculation, she would have to make a series of outlandish assumptions that find little support in the record. Namely, she would have to find not merely that the disparity evidence was sufficient to show retaliation, but that it accurately represented the degree of injury to the corporate providers (*i.e.*, that providers serviced identical patient populations and that no disparity existed prior to 1999). In addition, she would have to find that the reimbursement gap constituted pure lost profit to every corporate plaintiff – in other words, she would have to find that corporate plaintiffs did not scale back their operations at all due to reduced approvals. Finally,

she would have to find that the allocation between corporate providers accurately reflected the lost profits as to each.

Although there were a few bits of evidence in the record that spoke to these questions, they were not sufficient to render McDaniel's economic loss estimate anything but "speculative, remote, imaginary, or impossible of ascertainment." *Id.* Accordingly, a new trial is required to ascertain the appropriate measure of damages as to each corporate provider.

V

After entering judgment following the second trial, the district court awarded attorney fees and costs to certain plaintiffs against Fogarty and Brown. All parties now appeal that award. As discussed at length supra, we have concluded that the district court abused its discretion in granting defendants' motion for a new trial, and have reinstated the verdict from the first trial as to Fritz and Fogarty. That reinstated verdict differs substantially from the judgment entered following the second trial with respect to both liability and damages. In particular, we have dismissed all claims against Brown, such that Neal and Nancy Thrift are no longer prevailing parties against her pursuant to 42 U.S.C. § 1988(b). Given these discrepancies, we conclude that reconsideration of the fee award is necessary, and that it would unduly prejudice the parties if we were to decide the fee appeals on their merits. *See Williams* v. *Trader Publ'g Co.*, 218 F.3d 481, 488 (5th Cir. 2000) (vacating and remanding attorneys' fees when reversal of punitive damages reduced total judgment by approximately 40 percent); *Copper* v.

City of Fargo, 184 F.3d 994, 998 (8th Cir. 1999) (enforcing judgment rendered in first trial and remanding for determination of attorneys' fees); *Bunch* v. *Bullard*, 795 F.2d 384, 399-400 (5th Cir. 1986) (vacating and remanding when court reversed judgment as to certain prevailing plaintiffs); *cf. O'Rourke* v. *City of Providence*, 235 F.3d 713 (1st Cir. 2001) (reinstating verdict from first trial but upholding award of attorneys' fees from second trial when single plaintiff prevailed against defendant in both trials). Accordingly, we vacate the award and remand to the district court for a determination of appropriate fees in light of our partial reinstatement of the first trial verdict.

VI

We REVERSE the district court's grant of a new trial, REINSTATE the first trial verdict as to defendants Fritz and Fogarty, and REMAND for remittitur of certain individual damages awarded at the first trial as described in Part IV *supra*. We REMAND the corporate damages awards for a new trial limited solely to damages. We REVERSE the district court's denial of JMOL to Brown following the first trial, and REMAND with instructions to DISMISS. We also REVERSE the district court's award of partial fees and costs under 42 U.S.C. § 1988(b) and REMAND for reconsideration of the award in accordance with this disposition. All pending motions are DENIED.

ENTERED FOR THE COURT

Carlos F. Lucero
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 05-6106, 05-6109, 05-6110, 05-6112, 05-6122, 05-6358, 05-6359 & 05-6361

ALFRED MILTON EVANS, an individual; SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC., a corporation; RUSTLING WINDS, INC., an Oklahoma corporation; MORNING STAR MENTAL HEALTH SERVICES, INC., an Oklahoma corporation; DIVERSIFIED FAMILY SERVICES, INC., an Oklahoma corporation; SERENITY SPRINGS MENTAL HEALTH SERVICES, L.L.C., an Oklahoma corporation; JCH, INC., an Oklahoma corporation; NEAL THRIFT, an individual; NANCY GRAVESTHRIFT, an individual; JOHN MAJORS, an individual; CYNTHIA MAJORS, an individual; CHARLES PARKHURST, an individual; MARY PARKHURST, an individual; LEROY WHEELER, an individual; and JOEL HOLCOMB, an individual,

Plaintiffs-Appellants / Cross-Appellees,

v.

MICHAEL FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority; TERRIE FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority; and DANA BROWN, in her individual capacity, as well

as in her official capacity as Legislative Liaison for the Oklahoma Health Care Authority; TENKILLER BEHAVIORAL SERVICES INC., an Oklahoma corporation; DAVETTA MCINTOSH, an individual;

Defendants-Appellees / Cross-Appellants.

ORDER

Filed, October 23, 2007

Before TACHA, Chief Circuit Judge, McWILLIAMS, Senior Circuit Judge, and LUCERO, Circuit Judge.

Michael Fogarty's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

ELISABETH A. SHUMAKER,
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

NO. CIV-01-0252-HE
(Consolidated Number)

ALFRED MILTON EVANS, ET AL.,

Plaintiffs,

vs.

MIKE FOGARTY, ET AL.,

Defendants.

ORDER

Filed Feb. 23, 2005

Before the Court are renewed Rule 50 motions of defendants Michael Fogarty, Terri Fritz, and Dana Brown. For the reasons set out below, the Court concludes the motions should be granted in part and denied in part.

BACKGROUND

These consolidated cases[1] arise out of claims asserted by the owners and operators of multiple private facilities in Oklahoma that provide mental and behavioral health services to individuals qualifying for Medicaid assistance. The individual plaintiffs are Alfred Milton Evans, John and Cynthia Majors, Joel Holcomb, Neal and Nancy Thrift, Leroy Wheeler, and Charles and Mary Parkhurst. The corporate plaintiffs, all owned by the individual plaintiffs, are Southeastern Oklahoma Family Services, Inc., Morning Star Mental Health Services, Inc., JCH, Inc., Rustling Winds, Inc., Serenity Springs, L.L.C., and Diversified Family Services, Inc. Defendants Michael Fogarty, Terri Fritz and Dana Brown, sued in their individual capacities, are current or former officers or employees of the Oklahoma Health Care Authority ("OHCA"), the agency established by the State of Oklahoma to administer the Medicaid program.

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[1] The original cases – *Evans* v. *Fogarty*, CIV-01-252-HE and *Rustling Winds, Inc.* v. *Fogarty*, CIV-01-557-HE – included, as plaintiffs, the patients of one of the mental health care providers, plus other health care providers and their owners and, as defendants, the Oklahoma Foundation for Medical Quality and all defendants in their official capacities. The claims initially pled included due process and Medicaid Act violations. After multiple motions to dismiss and for summary judgment were filed and resolved, the issues for trial were reduced to a First Amendment retaliation claim asserted by the plaintiffs against defendants Fogarty, Fritz, Brown, Dr. Lynn Mitchell, and Jana Webb, in their individual capacities, and against the members of the Oklahoma Health Care Authority's Board of Directors for injunctive relief. At the conclusion of the first trial the Court granted the Fed.R.Civ.P. 50 motions of defendants Mitchell and Webb and also, in its July 9, 2003, Rule 50 order, declined to order any injunctive relief.

Plaintiffs initially asserted multiple claims against these and other defendants, based on their alleged discriminatory or unfair treatment of plaintiffs. After the disposition of various pretrial motions, the sole claim remaining for trial was plaintiffs' First Amendment retaliation claim. Plaintiffs alleged they formed an association of private mental health providers in late 1998 to advance their interests at the state capitol and then, through the association and individually, lobbied the legislature and other state officials regarding mental health matters on behalf of themselves and their clients. Plaintiffs contended defendants retaliated against them in various ways because of their lobbying or political activities and sought both money damages and injunctive relief.

This case was first tried in April, 2003. The jury returned a verdict in favor of all plaintiffs and against defendants Fogarty, Fritz and Brown in amounts totaling $30,565,000 in compensatory damages and $1,300,000 in punitive damages. The Court later granted defendant Brown's Rule 50 motion as to certain plaintiffs and claims, but otherwise denied the defendants' Rule 50 motions. Order, July 9, 2003. Subsequently the Court concluded the jury's verdict could not be sustained under the evidence and applicable law and ordered a new trial. Order, August 25, 2003.

The second trial occurred from September 15 to September 24, 2004. With respect to the claims against defendant Fogarty, the jury found for the plaintiffs and awarded damages totaling $1,020,000 for the individual plaintiffs and $14,295,000 for the corporate plaintiffs. As to defendant Fritz, the jury

found in her favor as to all claims except those of plaintiff Holcomb and his company, JCH, Inc, returning verdicts for them of $250,000 and $325,000, respectively. As to defendant Brown, the jury found in her favor as to all claims except those of Mr. and Mrs. Thrift,[2] returning verdicts in their favor of $25,000 each.

Following bifurcated proceedings, the jury awarded punitive damages with respect to some claims, finding against Fogarty and in favor of the corporate plaintiffs in amounts totaling $300,000; against Ms. Fritz and in favor of JCH, Inc. in the amount of $7500; and against Ms. Brown and in favor of Mr. and Mrs. Thrift in the amounts of $500 each.

Defendants moved for entry of judgment in their favor as a matter of law at the conclusion of both plaintiffs' evidence and the trial and in post-trial motions.[3]

DISCUSSION

Pursuant to Rule 50, a court should enter judgment as a matter of law only when "a party has

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[2] The only claims against defendant Brown were asserted by individual plaintiffs, as the claims of Joel Holcomb and the corporate plaintiffs were resolved by the Court's July 9, 2003, order addressing Rule 50 motions after the first trial.

[3] Strictly speaking, the present motions are motions to reconsider the Court's previous oral rulings on defendants' Rule 50 motions, rather than renewed post-judgment motions, as judgment on the jury verdict has not yet been entered. However, as Rule 50 permits renewed motions, the distinction is immaterial.

been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). The Court reviews the record as a whole, drawing all reasonable inferences in favor of the nonmoving party, and disregarding all evidence favorable to the moving party that the jury is not required to believe. *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000). The court may not make credibility determinations or weigh the evidence. *Id.* "The question is not whether there is literally no evidence supporting the [nonmoving] party . . . but whether there is evidence upon which the jury could properly find [for that party]." *Century 21 Real Estate Corp.* v. *Meraj Int'l Investment Corp.*, 315 F.3d 1271, 1278 (10th Cir. 2003) (internal quotations omitted). The party must present more than a "mere scintilla" of evidence supporting its claim for a jury to properly find in its favor. *Id.* Even a case relying on circumstantial evidence must be "based on more than mere speculation, conjecture or surmise." *Bones* v. *Honeywell Intern., Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).[4] Although all rational references from the

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[4] *Bones* was decided in a summary judgment context, but the standard for granting summary judgment "mirrors" the test under Rule 50. *Reeves*, 530 U.S. at 150, citing *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250-51(1986). *See also Spray Systems of Arizona, Inc.* v. *Lin-De, Ltd.*, 173 F.3d 864, 1999 WL 147237, at * 3 (10th Cir. March 18, 1999)("However, even circumstantial evidence must be relevant and must be based on more than surmise, speculation, or conjecture."). *Lin-De, Ltd.* and the other unpublished decisions referenced in this order are cited for persuasive value only under 10th Cir. R. 36.3(B).

facts are drawn in favor of the plaintiff, "the plaintiff is not entitled to inferences based on speculation and conjecture." *Vazquez-Valentin* v. *Santiago-Diaz*, 385 F.3d 23, 29-30 (10th Cir. 2004).

In a § 1983 First Amendment retaliation case, each plaintiff must establish as to each defendant that the plaintiff engaged in constitutionally protected conduct and that the defendant, acting under color of state law, retaliated against the plaintiff by adverse action, causing the plaintiff to suffer an injury that would "chill a person of ordinary firmness from continuing to engage in that activity." *McCook* v. *Springer School District*, 2002 WL 1788529, at * 6 (10th Cir. Aug. 5, 2002). The plaintiff must prove that the adverse action was substantially motivated as a response to the constitutionally protected conduct. *Id.*[5] *Accord Wolford* v. *Lasater*, 78 F.3d 484, 488 (10th Cir. 1996).

Personal participation also must be shown to recover on a §1983 claim. *Starr* v. *Downs*, 2004 WL 2603658, at *4 (10th Cir. Nov. 17, 2004). A defendant may not be held liable under § 1983 on a respondeat superior theory. "[T]o establish supervisory liability, a plaintiff must show that 'an affirmative link exists between the [constitutional] deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise.'" *Worrell* v. *Henry*, 219 F.3d

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[5] The [i]ntent to inhibit speech ... can be demonstrated either through direct or circumstantial evidence." McCook, 2002 WL 1788529, at * 7 (quoting Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300-01 (9th Cir. 1999)).

1197, 1214 (10th Cir. 2000) (quoting *Meade* v. *Grubbs*, 841 F.2d 1512, 1527 (10th Cir. 1988)).

A plaintiff may rely on circumstantial evidence to meet his or her burden.[6] That may be the only way to prove certain facts, such as intent.[7] However, even circumstantial evidence must be based on more than surmise, speculation or conjecture.[8]

Applying these standards and the principles more fully set out in the instructions given to the jury, the Rule 50 motions of each defendant are considered separately.

A. Defendant Fogarty's Rule 50 motion - individual plaintiffs' claims

Fogarty urges a variety of grounds in support of his motion. Some the Court has addressed previously and finds no basis for deciding differently now.[9] Most of defendant Fogarty's other arguments

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[6] *Court's Instructions to the Jury, Direct and Circumstantial Evidence*, p. 10.

[7] *See Bisbee* v. *Bey*, 39 F.3d 1096 (10th Cir. 1994).

[8] See *York* v. *AT&T*, 95 F.3d 948, 955 (10th Cir. 1996); Commercial Standard Ins. Co., 259 F.2d 210, 212 (10th Cir. 1958)(to warrant submission to the jury "the evidence . . . must be based upon more than mere conjecture, speculation, or surmise. It must rise above mere alternative possibilities. It must bring the theory upon which reliance is placed to the level and dignity of a reasonable probability.").

[9] For example, the defendants' claims of qualified immunity were rejected previously, as was defendants' Daubert challenge to the admissibility of evidence from Dale McDaniel, plaintiffs' expert. While the Court still views McDaniel's testimony as admissible, for the reasons noted in its earlier ruling, the adequacy of that testimony/evidence to support plaintiffs' claims is discussed subsequently.

pertain to the sufficiency of the evidence to establish he retaliated against plaintiffs.

As already noted, to prevail on a First Amendment retaliation claim a plaintiff must show that he engaged in protected activity, that the defendant retaliated against and injured him,[10] and that the adverse action was substantially motivated as a response to the plaintiff's constitutionally protected conduct.[11] At trial there was substantial evidence that the plaintiffs engaged in protected, First Amendment conduct. There was also evidence from which the jury could have concluded that any retaliatory action taken by Fogarty (or the other defendants) was motivated as a response to that conduct. The Court's summary of this evidence after the first trial equally applies to the evidence presented in the second trial:

> The evidence reflects a history of disputes between plaintiffs and defendants going back to at least 1998, when plaintiffs organized themselves into a formal association and began engaging in substantial and sustained lobbying and other activities on behalf of their interests. The parties appear to

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[10] The retaliatory action must have been sufficiently significant that it would "chill a person of ordinary firmness" from continuing to engage in the activity. *Mimics, Inc.* v. *Village of Angel Fire*, 394 F.3d 836, 847 (10th Cir. 2005).

[11] *See generally Court's Instructions to the Jury, Essential Elements of Individual Plaintiffs' and Corporate Plaintiffs' First Amendment Claim under Section 1983*, pp. 17-18.

> have had substantial disagreements on a broad range of policy issues where the positions advanced by plaintiffs with the state legislature or other state authorities were adverse to positions taken by defendants. Plaintiffs were successful in blocking adoption of an emergency rule proposed by HCA in 1998. Plaintiffs proposed legislation which would have altered HCA policies and practices and would have subjected it to additional oversight. Plaintiffs' lobbying activities with the Oklahoma legislature caused defendants to have to respond to numerous legislative inquiries and/or complaints. There is evidence to support the conclusion that those legislative efforts embarrassed defendants, irritated them, and were part of a long-running series of policy and other disputes between the parties. If adverse action was in fact taken against these plaintiffs, there was evidence from which the jury could have concluded that ill will based on defendants' irritation with plaintiffs' protected activities could have motivated it. (Order, July 9, 2003, p. 5.)

The critical issue here, as with the first trial, is whether plaintiffs presented evidence from which the jury could have reasonably concluded that Fogarty took adverse action against them. In other words, did the circumstantial evidence offered by plaintiffs — and it was all, or virtually all, circumstantial —

support a reasonable inference that Fogarty retaliated against the plaintiffs in some way?[12]

What the essentially circumstantial case against Fogarty and the other defendants did or did not prove is central to many of the Court's rulings and has been of major concern throughout these proceedings. Where is the dividing line between what is proven by circumstantial evidence and "conjecture, speculation or surmise?"

The Court concludes that merely showing that a defendant is the head of an agency or an agency program area, committed unrelated "bad acts," and had serious disputes or disagreements with a plaintiff, combined with evidence that the plaintiff was treated unfavorably by the agency or experienced some sort of undesirable agency action, is not enough, in and of itself, to support an inference that the defendant caused whatever harm the plaintiff objects to.[13] To hold otherwise would be

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[12] Plaintiffs cite *Reeves*, 530 U.S. at 133 for its discussion of the impact of circumstantial evidence in a Rule 50 context. While much of the Reeves discussion undoubtedly has broader application than the circumstances of that case (involving age discrimination and use of the *McDonnell Douglas* framework to determine intent/motive), there was no dispute in Reeves that adverse action had been taken against the plaintiff — he had been fired. Here, the inquiry essentially focuses not on Fogarty's intent, but on whether the evidence was sufficient to show that he actually did something to the plaintiffs.

[13] In responding to the defendants' renewed Rule 50 motions, plaintiffs correctly note that certain of their claims or theories have previously survived summary judgment or Rule 50 motions at the conclusion of the prior trial on similar evidence. However, as already mentioned, the sufficiency of the circumstantial evidence to prove retaliation has always been of (...continued)

inconsistent with the principle that a supervisor is not liable for the actions of subordinates merely because of his position. An affirmative link between the constitutional deprivation and his personal participation, exercise of control or direction or failure to supervise must be shown.[14] It also would conflict with the principle that the evidence, whether circumstantial or otherwise, must be sufficient to "bring the theory upon which reliance is placed to the

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central concern to the Court. The Court's order on the Rule 50 motions following the first trial noted the evidence suggesting retaliation was purely circumstantial and that "[t]he evidence of any retaliation by any defendant was extraordinarily thin." Order, July 9, 2003, pp. 8, 12. The order for new trial similarly observed: "Here, however, much of the evidence offered to establish retaliatory activity by defendants Fogarty, Fritz and Brown bordered on pure speculation and, in some instances, was based on little more than proof that the particular defendant was a supervisor of some activity at OHCA." Order, August 25, 2003, p. 3. More recently, when considering defendants' Rule 50 motions during the second trial, the Court stated: "I don't know where the dividing line is between the outer limits of a circumstantial case and pure speculation. But I think this case is on it if not over it." Transcript, pp. 1418-19. Focusing on the question not only of whether some adverse action occurred, but also of whether there was evidence — tested against the standards for circumstantial evidence — from which it could be reasonably inferred that the particular defendant (here, Fogarty) actually caused, or participated or acquiesced in it, the Court concludes the evidence was ultimately lacking.

[14] It is also inconsistent with the principle embodied in Fed. R. Evid. 404 that evidence of other bad acts is inadmissible to prove a person's character to demonstrate action in conformity therewith. Here, of course, the issue is not the admissibility of any particular evidence. Rather, the Court notes the underlying policy of Rule 404 only as it informs the discussion of the extent of the inferences that may properly be drawn from circumstantial evidence.

level and dignity of a reasonable probability." *Commercial Standard Ins. Co.* v. *Feaster*, 259 F.2d 210, 212 (10th Cir. 1958). A plaintiff must ultimately prove not just that something might have happened, but that it in fact did. *See Williams* v. *Boorstein*, 663 F.2d 109, 115 (D.C. Cir. 1980) ("What 'could have been' is never alone a sufficient foundation for a finding of what really 'was' . . . .").

Much of plaintiffs' evidence related to complaints with the Medicaid system (or provider reimbursement system) generally. There was substantial evidence that money was always in short supply, with the available public funds rarely, if ever, keeping up with demand for services. Reimbursement levels for providers were modest. Cutbacks in funding occurred at various times incident to recurring budget shortages or overruns. At some point, Oklahoma contracted with the Oklahoma Foundation for Medical Quality ("OFMQ") to act as a gatekeeper by reviewing and authorizing services requested for Medicaid reimbursement, at least partially to control the growth in the cost of mental health services. This prior approval and review process resulted in burdensome paperwork requirements, the frustration of having OFMQ personnel cut back prior authorization requests,[15] an onerous appeals process, etc. There was not, though, evidence from which a jury could have reasonably concluded that these circumstances were due to

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[15] Plaintiffs were critical of OFMQ personnel without medical or advanced degrees overruling, in some cases, diagnostic or treatment decisions made by persons with those credentials.

Fogarty trying to single out and punish the plaintiffs — these facts and circumstances applied to all private providers.[16]

Some of the evidence introduced was in the nature of alleged bad acts of Fogarty, including his use of the emergency rulemaking process when, in the plaintiffs' view, permanent rules should have been used, his alleged lies to legislators about his contacts with federal authorities, and his failure to respond to requests for information. However, regardless of what that evidence may have suggested in terms of background of the controversies or intent/motivation, it did not show adverse or retaliatory action against plaintiffs.

Plaintiffs also introduced evidence that they were audited by the SURS unit of OHCA. Plaintiffs objected to the fairness of some of the audit findings and, in some cases, their timing. However, there was no evidence indicating that Fogarty had any involvement in ordering the audits or the manner in which they were conducted. Although it was shown that some plaintiffs have appeals pending now before Fogarty regarding adverse findings made against them in past audits, there was no evidence that he has acted adversely to them in conjunction with those appeals.

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[16] While there was evidence that community mental health centers ("CMHC's) were funded in different, and sometimes more favorable, ways than private providers, there was no suggestion that Fogarty was responsible for whatever differences existed between private providers and CMHC's or that any differences were directed at, or a reaction to, plaintiffs.

As to plaintiffs Evans and Southeastern Oklahoma Family Services, Inc., there was evidence that the corporation's Medicaid provider contract was terminated in January, 2001, following adverse audit findings at two of its facilities.[17] There was not, though, any evidence that Fogarty instigated or caused the termination.

At trial the plaintiffs established they were substantially involved in seeking a supplemental appropriation from the legislature in 2000. OHCA cut the maximum number of units available for certain services in 1999 as a cost control measure. Subsequently, plaintiffs lobbied for supplemental funding to restore the cuts. Two supplemental appropriations measures were passed, totaling approximately two million dollars.[18] Plaintiffs' complaint was that, notwithstanding the passage of the supplemental appropriation for which they lobbied, they received none of the additional money. The evidence was disputed as to whether plaintiffs had complied with the procedures announced by OFMQ to restore unit levels after passage of the bills. There was evidence suggesting that at least some of the plaintiffs sought and received increases in authorized units, but, taking the evidence in the light most favorable to the plaintiffs, there was evidence from which the jury could have concluded plaintiffs were not given funds or restored units that they should have received. Significantly, there was

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[17] Transcript, pp. 676-85; Plaintiffs' Exhibit 22.

[18] With federal matching funds, the total increased funding was approximately $6.0 million.

no evidence of Fogarty's involvement in OFMQ's treatment of any requests plaintiffs made for increases in maximum units. There was evidence that at least one of the plaintiffs provided information to Fogarty relating to restoration of the requests, but nothing to suggest he blocked the requests or took any adverse action with respect to them.

With the exception noted below, the evidence simply was insufficient to support an inference that Fogarty took adverse or retaliatory action against plaintiffs. It is not enough to speculate that he might have.

There was proof the defendants, in various meetings with legislators, referred to some of the plaintiffs as "crooks and frauds." Although it was not altogether clear as to who said what, or who at the various meetings was called a crook or a fraud, there was evidence from which the jury could have concluded Fogarty made these comments about some of the plaintiffs. While § 1983 does not provide a federal remedy for defamation, *Rakowski* v. *Merritt*, 2003 WL 254878, at *1 (10th Cir. Feb. 5, 2003)(defamation is not a constitutional violation), defamatory language accompanied by some "threat, coercion, or intimidation intimating that punishment, sanction or adverse regulatory action will imminently follow," may support a First Amendment retaliation claim. *Suarez Corp. Indust.* v. *McGraw*, 202 F.3d 676, 687 (4th Cir. 2000).[19]

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[19] The evidence most clearly suggesting an explicit threat consisted of testimony of phone calls involving Fogarty that (...continued)

Here, although a close question, the Court concludes there was evidence from which the jury could reasonably have found that Fogarty defamed and at least implicitly threatened those plaintiffs present in the meetings.

This same conclusion cannot be drawn, though, as to plaintiffs Mr. Holcomb and Mrs. Parkhurst. There was no evidence that they lobbied at the State Capitol, were in the meetings or were present when the particular statements were made. Absent some basis for concluding the remarks were in some way directed at them, the jury awards in their favor cannot be sustained on the basis of these alleged comments. Mr. Holcomb and Mrs. Parkhurst have failed to show that Fogarty's remarks caused them personally "to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity." *Mimics, Inc.* v. *Village of Angel Fire*, 394 F.3d 835, 847 (10th Cir. 2005).[20] Plaintiffs Holcomb and Parkhurst cannot recover based on injury to another.[21]

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occurred in March of 2001, prior to the applicable limitations period for plaintiffs' claims. Transcript, pp. 1041, 1050 (Mrs. Majors' testimony). However, viewing all the evidence in the light most favorable to plaintiffs, there was other evidence from which the jury might have inferred that at least some implicit threat accompanied the alleged defamatory statements.

[20] Mrs. Parkhurst essentially conceded that Fogarty had done nothing to her personally, but asserted he had damaged her business. Transcript, pp. 1032-33.

[21] The jury was instructed that each plaintiff had the burden of establishing both his or her entitlement to relief and the amount of damages he or she had suffered. *See* Court's Instructions to the Jury, pp. 7, 17-18, 25-29.

In sum, while most of the evidence did not demonstrate adverse action by Fogarty against the individual plaintiffs, the Court concludes the evidence as to his alleged threatening and defamatory statements, taken in the light most favorable to plaintiffs, was sufficient to support the jury's finding that Fogarty was liable to the individual plaintiffs, excepting plaintiffs Holcomb and Parkhurst.

In support of his request for judgment as a matter of law, Fogarty also challenges the damages awarded to the individual plaintiffs. He claims both that the verdicts duplicated the damages granted the corporate plaintiffs, to the extent they included compensation for the decreased value of the plaintiffs' businesses, and that the evidence did not support recovery for mental distress.

Several aspects of the damages awarded in this case are troubling. In the first trial, the individual plaintiffs essentially sought relief for their mental anguish or similar intangible harm, with the corporate plaintiffs asserting claims for economic damages. Although the nature of the individual plaintiffs' damages claims in the second trial was not completely clear, it appears they too were offering evidence of economic loss.[22] Several of the plaintiffs opined that their businesses had been worth some substantial amount as going concerns,[23] but, due to

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[22] See Transcript, pp. 705-13.

[23] Transcript, p. 1246 (Mr. Majors' testimony), $500,000 for Morning Star; p. 1104 (Mr. Wheeler's testimony) , $500,000 for Serenity Springs; p. 1000 (Mr. Parkhurst's testimony), $500,000 (...continued)

the defendants' actions, were now worthless.[24] Fogarty suggests that, as a matter of law, basing damages on that theory would constitute a double recovery, as those were the same damages the corporate plaintiffs sought. The Court agrees.

To the extent any plaintiff's business had a going concern value, that value was based on the business' ability to generate a profit.[25] To award the corporate plaintiffs damages for profits lost as a result of a defendant's actions and then permit the individual owners to recover what is, essentially, the capitalized value of those same profits, would result in a double recovery.[26] Consequently, the damage awards to the individual plaintiffs in this case cannot be justified on the basis of the lost value of their businesses or investments.[27] They can, however, be sustained as compensation for the plaintiffs' emotional distress.

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for Diversified Family Services; p. 86 (Mr. Thrift's testimony), $1,000,000 for Rustling Winds; p. 1173 (Mr. Holcomb's testimony), $300,000 for JCH, Inc.

[24] No plaintiff offered a specific basis for their estimated value of their business. Although unnecessary to the decision, it is questionable whether an otherwise proper damages award could be based on nothing more specific than an owner's conclusory opinion as to estimated value. Other issues also exist as to this type of claimed damage.

[25] The income of these businesses was substantially derived from payment for the services they rendered.

[26] Whether there is a sufficient basis for recovery of lost profits by the corporate plaintiffs is discussed subsequently.

[27] *See* Court's Instructions to the Jury, Damages - Individual Plaintiffs, p. 27, specifying that an individual plaintiff may, in addition to damages for emotional or mental anguish, recover economic losses caused by the constitutional violation, but not (...continued)

"Testimony by a plaintiff, and by one close to him or her, of emotional distress, supported by inferences readily drawn from the facts surrounding and following from the denial of procedural due process are sufficient to support an award of damages." *Koopman* v. *Water Dist. No. 1*, 41 F.3d 1417, 1420 (10th Cir. 1994), citing *Carey* v. *Piphus*, 435 U.S. 247 (1978). Here, there was sufficient corroboration upon which the jury could base its awards for emotional distress.

The variance in amounts awarded to plaintiffs is troubling. If, under the evidence, the individual plaintiffs' recovery is limited to damages attributable to emotional distress stemming from being called a crook or fraud, it is difficult to justify the inconsistency in the damage awards. The jury awarded Mr. Parkhurst $250,000 and Mr. Evans $10,000, with the other plaintiffs somewhere in between. It is possible, and perhaps likely, that Mr. Parkhurst's award included some recovery for the lost value of his business, an inappropriate basis for relief, as just noted.[28] However, as some of the other individual plaintiffs' damage awards cannot be similarly explained, the Court is reluctant to speculate as to the specific bases for the jury's determinations. Apart from noting the concern and, as the damages were given to compensate for losses

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the economic losses or lost profits of the corporation he or she owned.

[28] Mr. Parkhurst made a somewhat tentative estimate of the value of his business, owned jointly by him and Mrs. Parkhurst, of $500,000. Transcript, p. 1000. The jury's award to Mr. and Mrs. Parkhurst together equaled $500,000.

not susceptible of precise calculation, the Court concludes the variances are not so excessive as to invalidate the awards.

Based on the foregoing, the Court concludes defendant Fogarty's motion for judgment as a matter of law should be granted as to Mr. Holcomb and Mrs. Parkhurst, but denied as to the claims of the other individual plaintiffs.

B. Defendant Fogarty's Rule 50 motion - corporate plaintiffs' claims

The jury verdict in favor of the corporate plaintiffs comprised the bulk of the recovery against defendant Fogarty. To the extent the corporate plaintiffs rely on the same factual circumstances as the individual plaintiffs to establish Fogarty retaliated against them, the analysis applied to the individual plaintiffs' claims also applies to the corporate claims. What distinguishes the corporate claims is the corporate plaintiffs' reliance on "disparity" evidence.

The "disparity" evidence — evidence that the average reimbursement per unit of service was lower for the corporate plaintiffs than for other private providers — is central to plaintiffs' claims in two ways. First, plaintiffs relied on this evidence to show retaliation, viewing it as the "smoking gun." They maintain they were treated differently from other similarly situated private providers due to Fogarty's actions. Second, they used the evidence to establish the amount of their damages. The Court concludes the "disparity" evidence ultimately fails to aid the plaintiffs on either issue.

Broadly summarized, the "disparity" evidence arises from this background. Over several years in the late 1990's, Oklahoma experienced substantial increases in the cost of mental health services provided by private providers and paid for by Medicaid.[29] The evidence indicated the State attempted to control these increases and manage the resources allocated to this area of health care by establishing a system of prior review and authorization for mental health services. OHCA engaged the Oklahoma Foundation for Medical Quality ("OFMQ") as a third party gatekeeper to perform this function. An approved provider would prepare a proposed treatment plan for each of its patients or clients and would submit that to OFMQ. All private providers in Oklahoma were required to get prior authorization from OFMQ as a precondition to reimbursement for services rendered.

The treatment plan would identify the various types of services sought to be provided to a particular client and the number of units of such service. Applying certain criteria, which included the maximum numbers of units allowed for each level of care, OFMQ would then approve, reduce or deny the provider's request for approval of the units set out in the treatment plan.[30] Once approval from OFMQ

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[29] All private providers approved to render services to Medicaid patients did so pursuant to a contract between the provider and OHCA.

[30] In general, the criteria identified different levels of care (I to IV), depending on the type and severity of the mental or behavioral condition. Plaintiffs disputed whether the criteria really constituted "medical necessity criteria" or were too subjective. However, there was no dispute that the criteria (...continued)

was obtained, the provider rendered the services and then would seek reimbursement from OHCA for them.

The reimbursement amount depended on the type of service provided. Services included, among others, group therapy, family therapy, individual therapy, and psychosocial rehabilitative services. Employing a relatively complex system of weighting and "relative value units," reimbursement rates were assigned to each type of service. Certain services, such as group therapy sessions, had a low reimbursement rate per unit. Others, such as individual therapy, had a much higher unit rate. Consequently, a treatment plan might include a range of potential services.

During most of the relevant time period, Unisys, a third party contractor, handled the mechanics of paying the providers and maintaining the payment records. Plaintiffs' disparity evidence consisted of information derived from Unisys' records and reports. Under the system used by OHCA and Unisys, each provider and each facility was assigned a "J" number, making it possible to separately track reimbursements to multiple facilities of the same corporate provider.[31] From the reports it was

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were, in general, applicable to all providers seeking authorization.

[31] The "J" numbers for the various providers were: Southeast Oklahoma Family Services, J7315629501 (Transcript, p. 641); Morning Star, J7315097311 (Transcript, p. 1199); JCH, Inc., J7314898115 (Transcript, p. 1183); Rustling Winds, J7315561381 (Transcript, p. 59); Serenity Springs, J7315561381 (Transcript, p. 1068); Diversified Family Services, (...continued)

possible to determine the number of units requested and the amounts paid to each provider. From that information the average reimbursement per unit that a particular provider or facility received could be derived.

Plaintiff's expert witness, Mr. McDaniel, prepared various summaries of the information in the Unisys records.[32] He prepared monthly summaries for each of 25 months, showing the number of units, the amounts received, and the amount received per unit for each plaintiff and certain others originally in the plaintiff group. He performed the same calculations for each community mental health center ("CMHC"). He also provided totals, though not by individual provider, for all other private providers.[33] McDaniel's calculations indicated that for the 48 month period included in his analysis,[34] the average reimbursement per unit for the plaintiffs (or what plaintiffs termed the "politically active" group of providers) was $8.65, for CMHC's was $13.02, and for all other private providers was $18.13.[35] Plaintiffs maintain this

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J7314961344 (Transcript, p. 981). The last four digits of each J number identify the provider, while the other digits identify the particular facility.

[32] McDaniel reviewed 25 months of Unisys' records covering, with some gaps, the period from July 1999, to February, 2002.

[33] Plaintiffs' Exhibits 61.1-61.25.

[34] His analysis extrapolated the 25 months results over a longer time period, including months for which no records were available.

[35] Plaintiffs' Exhibit 61.27 is a chart showing these amounts. See also Transcript, p. 1348 (McDaniel testimony).

difference establishes Fogarty retaliated against them by causing OFMQ to reduce the number and type of units it approved for them as compared to other providers.

For a number of reasons, the Court finds the "disparity" evidence was insufficient to support an inference that Fogarty retaliated against the plaintiffs.[36] First, as has been discussed in conjunction with the claims of the individual plaintiffs, there was no direct evidence suggesting Fogarty had anything to do with causing OFMQ to approve or disapprove a particular request or requests by these or any other providers. Thus, even if the disparity evidence was sufficient to prove that someone treated them unfairly, it does not support the further inference that Fogarty was the person doing so.

Second, there was no evidence that this "disparity" in reimbursement levels occurred after and because of plaintiffs' protected First Amendment activities. For the "disparity" evidence to suggest retaliation for plaintiffs' political activity, the plaintiffs would have to show that the disparity did

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[36] In the order granting defendants summary judgment on the equal protection claims of Evans and Southeastern Oklahoma Family Services, Inc., the Court concluded the disparity data as to reimbursement rates failed to establish the existence of a factual issue which might make out an equal protection violation. Order, April 16, 2003. Similarly, in the order disposing of the Rule 50 motions after the first trial, the Court noted: "In short, if the only adverse or retaliatory actions asserted by plaintiffs were based on "disparities" in reimbursement amounts, the Court would enter judgment as a matter of law for defendants." Order, July 9, 2003, p. 8.

not exist before the protected conduct. However, there was nothing in the evidence from which the jury could have drawn that conclusion. If anything, the evidence suggested the contrary. Disparities of various sorts existed before plaintiffs organized their provider association and became politically active.[37] The testimony indicated plaintiffs' organization and political activities were designed from the beginning to achieve what they saw as fair treatment relative to other providers and to "level the playing field." There was testimony from some of the plaintiffs that their requests for approval of units began being cut back in the period after they formed their association. However, there was no evidence that other providers did not experience similar cuts during that period.[38] The result is that, without some kind of comparative data for the period prior to the protected activity, disparity evidence does not show retaliation even it was otherwise wrongful or unfair to plaintiffs.

Another more fundamental problem exists, however, with respect to the disparity evidence. Proof of differences in average reimbursements per unit may suggest retaliation through discriminatory treatment only if it is shown, or can be reasonably

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[37] *See* Plaintiffs' Exhibit 3.2, an October 8, 1998, letter from Nancy Graves (now plaintiff Nancy Thrift) to the governor, objecting to "great differences in the reimbursement rates of private and public facilities." The provider association was formed in late 1998.

[38] There was, on the other hand, evidence that OHCA, through OFMQ, was cutting units for all providers at various times due to budget constraints.

inferred, that plaintiffs were similarly situated with other private providers. In this case, that would require a showing of at least the following: (a) that plaintiffs' patient populations were the same in terms of mental health conditions requiring treatment; (b) that the incidence of those conditions within each patient group — the mix of patients — was the same as for the groups treated by other providers; (c) that the treatment plans submitted by plaintiffs to OFMQ contemplated the provision of the same services being rendered by other providers; and (d) that, in general, the proportion of "high cost" versus "low cost" services — the mix of services — requested by plaintiffs was the same as that requested by other providers. The Court concludes the proffered evidence failed to support the inference that the corporate plaintiffs were, in fact, similarly situated to the other mental health services providers.

The evidence reflected that, as of the year 2000, there were approximately 180 private providers providing services at approximately 330 sites around Oklahoma.[39] These providers were never specifically identified. Apart from the average unit reimbursement rate for these providers, none of the types of evidence just described, such as patient mix, that would demonstrate that these other private providers were similarly situated to the plaintiffs was offered. Some of the plaintiffs did give

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[39] Transcript, p. 955 (Fritz testimony). Mr. McDaniel, plaintiffs' expert, did not specify the number of other providers whose data he examined, but he did indicate the records were voluminous.

conclusory testimony as to the similarity of their populations or services rendered to those of other providers, based on providers they previously worked for or places they had visited. However, no plaintiff was in a position to determine the comparability of the broad group of private providers with which they compared themselves.[40]

Dr. William Schmid, one of plaintiffs' witnesses who had experience with a broader range of facilities, did testify that the types of clients would be similar between facilities and that the types of care provided for various conditions should be similar. He did not, however, testify that the particular percentage of patients with a particular illness would be similar from facility to facility. He also noted that considerations such as the age of the patient served would impact the services provided.[41]

A detailed examination of plaintiffs' disparity evidence illustrates why it will not support the

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[40] *See Woods* v. *National Medical Care, Inc.*, 2001 WL 1573574, at *4 (10th Cir. Dec. 11, 2001) (plaintiff's "conclusory statement that her new [employment] position was not comparable does not create a genuine issue of material fact"); *Bethley* v. *City of Spencer*, 37 F.3d 1509, 1994 WL 573765, at * 3 (10th Cir. Oct., 19, 1994) (expert's conclusory affidavit lacking in factual support failed to create an issue of fact in summary jury context); *Pendleton* v. *Conoco, Inc.*, 23 F.3d 281, 286 (10th Cir. 1994) (standard for Rule 50 motion "is identical to the standard for summary judgment under Rule 56"). *See generally United States* v. *Williams*, 212 F.3d 1305, 1301-10 & n.6 (D.C. Cir. 2000) (for lay opinion testimony to be admissible as rationally based on the witness' perception, a sufficient factual foundation must exist.)

[41] Transcript, pp. 857-64 (Schmid testimony).

inference – that they were just like all the other providers in the state and should therefore have been paid the same (on an average per unit basis) – that plaintiffs asked the jury to draw from it. To the contrary, plaintiffs' evidence, in the form of McDaniel's monthly summaries of the reimbursements received by plaintiffs and others, established rather clearly that the plaintiffs are not even like each other.

The monthly summaries, plaintiffs' exhibits 61.1 through 61.25, supplied an historical record of the reimbursements received, by facility, for each of the 25 months as to which records were available. Among other things, these exhibits showed that for roughly the two year period from August, 1999, through July, 2001, the Morningstar facility associated with "J" number J7315097311 had an average monthly reimbursement rate ranging from $22 to $28 per unit.[42] During the same time period, the Rustling Winds facility associated with "J" number J3314726373 had an average monthly reimbursement rate ranging from roughly $4 to $6 per unit.[43] Such differences, with rates at one facility exceeding the other by in excess of 400%, render unreasonable any inference that these two facilities were similarly situated.

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[42] One month in this period showed a rate of $10.73; all others are consistent with the indicated range.

[43] The ranges for other plaintiff providers were, for the most part, consistent over time for each provider and fell somewhere between the average rates indicated for the Morning Star and Rustling Winds facilities.

However, not only did the average unit reimbursement rate differ among the plaintiff providers, it varied among the multiple facilities operated by the same corporate plaintiff. For example, from February 2000 to February 2002,[44] the Rustling Winds facility associated with "J" number J3314726373. had an average monthly reimbursement rate of $4 to $6 per unit, while the Rustling Winds facility identified by "J" number J4314726373 had average reimbursements ranging from $10 to $27 per unit. The difference clearly does not support an inference that these two facilities were similarly situated in terms of populations, services rendered and the like.[45]

Other evidence offered by plaintiffs also undermined the reasonableness of inferring that they and all other providers were similarly situated. Mrs. Thrift testified the Rustling Winds facilities in McAlester and Poteau primarily served adults with serious and persistent mental illnesses,[46] while the Wilburton facility primarily served children and adolescents and provided family counseling services.

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[44] The time frame varies from the prior comparison because the referenced facilities were not all open at the same time.

[45] Disparities in the plaintiff providers' average reimbursement rates cannot be explained on the basis of OFMQ responding differently to their requests, as all plaintiffs testified that OFMQ reduced their requests for units by approximately 25-30%. See Transcript, pp. 1361-62 (McDaniel noting, in connection with one of his damages computations, his understanding of plaintiffs' testimony to be that they had all had their units reduced by approximately 25%).

[46] Transcript, pp. 234-35.

That testimony was consistent with and perhaps explains the substantially different per unit reimbursement rates of the various Rustling Winds facilities.

Another plaintiff, Mr. Wheeler, testified that the client population of his facility, Serenity Springs, was 99% children.[47] Yet most other plaintiffs testified that their facilities served a combination of adults and children. The evidence was undisputed that, at least at times, reimbursements differed depending on whether adults or children were being served.[48] The severity of the conditions being treated also greatly affected the level of reimbursement. The existence of such variables within the plaintiff group further illustrates that it could not be reasonably inferred, from the evidence offered at trial, that all other providers were similarly situated with plaintiffs.

McDaniel's monthly summaries also showed the average per unit reimbursements for CMHC's – the state owned or state contracted facilities that provided outpatient mental health services. The summaries reflected wide variances in their reimbursement rates, demonstrating that a particular CMHC facility is not like every other CMHC in terms of their patient populations, mix, etc.

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[47] Transcript, pp. 1068-69.

[48] The evidence indicated that in 1999, during a period of cost containment efforts by the legislature and OHCA, units for children were cut by 5%, while adult units were cut by 30%.

In short, given the undisputed evidence of differences between the plaintiffs, differences between multiple facilities of the same plaintiff, differences between the various CMHC's, and the like, the evidence plainly did not provide a nonspeculative basis for the inference plaintiffs asked the jury to draw – that plaintiffs were similarly situated with all other private providers in the State and were therefore entitled to the same average reimbursement.

Although perhaps unnecessary in light of the Court's ruling on the issue of Fogarty's liability to the corporate plaintiffs, some discussion of the damages sought by the corporate plaintiffs and awarded by the jury is appropriate. Even if the Court concluded the evidence supported a finding that Fogarty had retaliated against the corporate plaintiffs, the damage awards could not stand because of two substantial problems with the plaintiffs' lost profits computation.

The measure of damages for the corporate plaintiffs was their lost profits attributable to the alleged retaliation.[49] Plaintiffs offered no evidence from which the jury might have made a conventional assessment of lost profits, such as some computation of profit per unit multiplied by the number of units they claimed to have been wrongfully denied. Instead, plaintiffs relied on the same "disparity" evidence just discussed. That evidence described the difference between gross revenues the plaintiffs

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[49] Court's Instructions to the Jury, Damages – Corporate Plaintiffs, pp. 28-29.

actually received and the gross amounts they would have received if they had been paid the average unit reimbursement rate of other private providers.[50] Plaintiffs argued that this was the appropriate measure of their lost profits because they actually provided to their clients all the units of services for which they sought OFMQ's approval, regardless of whether OFMQ approved them for reimbursement.[51] Because they incurred the costs involved in generating the services, the plaintiffs contended they were entitled to the gross reimbursement amount.

Plaintiffs' position is contrary to the applicable legal standards. Plaintiffs are entitled to recover damages from defendant Fogarty only for harm he proximately caused.[52] In addition, the law requires a plaintiff to mitigate his or her damages.[53] The question raised by plaintiffs' theory of recovery boils down to this: what obligation did a plaintiff have, once it sought approval of a particular treatment plan from OFMQ and OFMQ either reduced the units of services approved or denied the request altogether? In the context of a claim against Fogarty, and absent a legal obligation to the

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[50] *See generally* Transcript, pp. 1354-58 (McDaniel testimony).

[51] All the plaintiffs testified to this general effect; there was no evidence to the contrary.

[52] Court's Instructions to the Jury, Essential Elements of Corporate Plaintiffs' First Amendment Claim under Section 1983, p. 18, fourth element.

[53] Court's Instructions to the Jury, Duty to Mitigate Damages, p. 26. Defendants bear the burden of proof as to mitigation of damages. Here, however, the application of the doctrine is based on the undisputed facts offered by plaintiffs.

contrary, a plaintiff's obligation at that point was to stop incurring additional costs and not incur the expense of providing the services. If, despite the lack of a legal obligation to do so, a plaintiff chose to go ahead and provide the services voluntarily on some sort of pro bono basis, the cost of its performance cannot be shifted to Fogarty as something he caused.

Hence the question becomes whether plaintiffs were legally obligated to provide the various services included in a treatment plan even though OFMQ had denied the prior authorization necessary for reimbursement. Plaintiffs maintained the Medicaid provider agreement they entered into required them to provide the services.[54] However, neither that contract nor other applicable law supports that position.

The contract provision plaintiffs rely on requires the outpatient health services provider "to comply with 42 U.S.C. §1396a(a)(25)(D) of the Medicaid Act, which prohibits a Medicaid provider from refusing to furnish services to an individual eligible to receive Medicaid compensable services because of a third party's potential liability for payment for the services." Plaintiff's Exhibit 59.6, Agreement between OHCA and Outpatient Behavioral Health Services Provider, Art. 4(c). This language does not require a provider to furnish Medicaid services to all

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[54] The interpretation of the provider contract presents a legal question, as does the nature of plaintiffs' legal obligations arising from the Medicaid statutes. The Court sustained objections to testimony from some of the plaintiffs when they attempted to give their interpretation of the provider contract.

eligible recipients regardless of whether OFMQ has authorized them.[55]

Similarly unsupportive are the provisions of the Medicaid Act the plaintiffs cited, 42 U.S.C. §1396a(a)(23)-(25),[56] and the reference in the meeting materials for the June, 1996, meeting of OHCA's Medical Advisory Committee to several provider requirements, including their obligation to "provid[e] services without regard to the patient's ability to pay." Plaintiff's Exhibit 42.5. Neither compel a provider to furnish services regardless of whether they are approved for reimbursement.

The decision to provide uncompensated services to others may have made good business sense for

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[55] In this context, OHCA is not a "third party" within the meaning of the contract.

[56] The "freedom of choice" provision of the Medicaid Act, § 1396a(a)(23), was discussed by the Second Circuit in *Catanzano by Catanzano* v. *Wing*, 103 F.3d 223, 231 (2nd Cir.1996). The court stated that under the provision " a Medicaid claimant may obtain services from any qualified provider 'who undertakes to provide him such services.' The federal regulations elaborate that 'a recipient may obtain Medicaid services from any [provider] that is ... [w]illing to furnish them to that particular recipient.' 42 C.F.R. § 431.51(b)(1)(i). The Health Care Financing Administration noted in its explanation of the 1991 amendments to this regulation that it 'added language to counteract a misunderstanding that has arisen in the past: freedom of choice does not obligate a Medicaid provider to furnish services to every recipient.... [A] recipient may seek to obtain services from any qualified provider, but the provider determines whether to furnish services to that particular recipient.' 56 Fed. Reg. 8835 (1991)." *Id.* at 231.

other reasons.[57] Helping others without compensation is no doubt laudable. For purposes of this case, however, the question is whether a legal basis existed for shifting to Fogarty the costs plaintiffs incurred by providing the unreimbursed services. None was shown. Plaintiffs cannot voluntarily provide services for which authorization had been denied and then shift the costs to Fogarty – he did not cause the costs to be incurred.[58]

The second significant problem with plaintiffs' damages theory, based on giving the corporate plaintiffs the same average reimbursement per unit as every other private provider, is that it results in a damages figure far greater than what could plausibly be attributed to any retaliation by Fogarty.

McDaniel first computed damages by determining the total number of units for which plaintiffs had been paid during the period for which records existed, extrapolating that figure to the 48 month period in issue,[59] and then multiplying the

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[57] One plaintiff testified the unapproved services were provided, at least in part, as a means of minimizing the risk of future lawsuits. Transcript, p. 50.

[58] To the contrary, at least insofar as allocation of the duties and burdens of this case was concerned, plaintiffs had a duty to mitigate damages resulting from any unfair treatment, rather than increase them.

[59] Defendants objected to the extrapolation of 25 months data over a 48 month period. Given the relative consistency of the average per unit reimbursement rate during the 25 months, the Court does not view the extrapolation as objectionable, though it likely presses the outer limits of what might be reasonably projected from the data.

adjusted number of units times the "disparity" in average unit reimbursement rates between the plaintiffs and other private providers.[60] Using this method, McDaniel calculated the corporate plaintiffs' damages to be $11,454,266.88. He then calculated interest on this amount at 7%, resulting in an additional $3,070,993.12, for a total of $14,525,260.

McDaniel also made a second calculation, taking into account the plaintiffs' testimony that the units they requested were generally reduced by about 25%.[61] He computed the dollar impact of that for each of the providers, in effect adding the amounts attributable to the 25% reduction, plus interest, to the totals the plaintiffs actually received. According to this calculation, but for the 25% cuts, the plaintiffs as a group would have been paid an additional $4,200,583.[62]

The second calculation — which added back the 25% allegedly cut from the authorization requests — would put the plaintiffs in the position they would have been in if their requests had been granted in full by OFMQ. The first calculation — which raised plaintiffs' reimbursement total based on the average per unit reimbursement rate for other private

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[60] Transcript, p. 1356 (McDaniel testimony). His data indicated the plaintiff providers had been compensated at an average per unit rate of $8.65, while the average for the other private providers was $18.13. McDaniel then multiplied the difference — $9.48 — times the plaintiff's total number of units.

[61] Transcript, pp. 1361-67 (McDaniel testimony).

[62] Transcript, pp. 1365-66 (McDaniel testimony). The transcript does not reflect the totals prior to the addition of interest.

providers — resulted in a damages award that was roughly $10,000,000 more than the reimbursement amount plaintiffs had actually sought from OFMQ. It is plainly unreasonable to suggest that Fogarty retaliated against plaintiffs by somehow failing to cause OFMQ and/or OHCA to pay them more than they even requested in the first place. It is apparent from the amount of damages awarded by the jury that they relied on McDaniel's first, excessive calculation.

Regardless, as the evidence was insufficient to establish that Fogarty retaliated against the corporate plaintiffs, the Court concludes Fogarty's motion for judgment as a matter of law must be sustained as to the corporate plaintiffs' claims.

C. Defendant Fritz's Rule 50 motion - Plaintiffs Holcomb and JCH, Inc.

The jury found in favor of defendant Fritz as to the claims of all plaintiffs except for Joel Holcomb and JCH, Inc., Holcomb's company, awarding $250,000 to Holcomb individually and $325,000 to JCH, Inc., plus a punitive damage award to JCH, Inc. of $7500. Some of the prior discussion pertaining to defendant Fogarty applies to the claims against Fritz. There was evidence Holcomb/JCH, Inc. engaged in protected First Amendment activity, although it was considerably more limited than that of the other plaintiffs.[63] Further, there was evidence

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[63] Holcomb was a member of the provider's association (Transcript, p. 1158). He spoke at an OHCA board meeting in January, 1999 (Transcript, p. 1159) and sent letters to his state legislators (Transcript, p.1159). However, there was no evidence (...continued)

from which the jury could have concluded that Holcomb and Fritz had disagreements and that she knew he was a member of the provider's association.[64] As with the claims against Fogarty, the critical question is whether there was evidence from which the jury could have reasonably concluded she took some adverse or retaliatory action against Holcomb or his company.

As there was no evidence suggesting that Holcomb lobbied at the State Capitol, he could not have been present at the meetings where some or all of the defendants allegedly described other plaintiffs as "crooks or frauds." Holcomb's claims against Fritz, therefore, cannot be sustained on the same basis as the individual plaintiffs' claims against Fogarty were.

Holcomb claims Fritz retaliated against him by: (1) causing OFMQ to cut back on the units approved for JCH, Inc. (and thus the reimbursements it could receive) and (2) causing CARF, the accrediting agency, to deny accreditation to JCH, Inc. However, that retaliation, if it occurred, was against JCH, Inc., the corporate plaintiff, not Holcomb individually. In the absence of any evidentiary basis for a finding that Fritz retaliated against Holcomb personally, the

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that he ever came to the State Capitol or participated in the lobbying activities there.

[64] They apparently took conflicting positions on some aspects of the licensing or staff certification requirements OHCA ultimately applied to providers. There also was testimony that Fogarty and Fritz laughed, rolled their eyes, and whispered during Holcomb's January 1999, presentation to the OHCA board. Transcript, p. 1160.

award in his favor cannot stand and Fritz's Rule 50 motion as to Holcomb's claim against her must be granted.

Much of the prior discussion pertaining to the corporate plaintiffs' claims against Fogarty applies equally to JCH, Inc.'s claim against Fritz. As with Fogarty, there was no evidence that Fritz told OFMQ to cut JCH Inc.'s approved units. There was no evidence that she told OFMQ to slow the processing of its requests or to take adverse action of any sort against JCH, Inc. There was no evidence that Fritz's actions caused or contributed to the "disparity" in reimbursements compared to other providers. Indeed, apart from whatever significance is appropriately given to the "disparity" evidence, there was no proof that JCH, Inc. was treated differently from other providers, by Fritz or anyone else.

As with the corporate claims against Fogarty, the issue becomes whether there was circumstantial evidence from which the jury could have reasonably concluded that Fritz somehow impacted JCH Inc.'s approved units or cash flow. It was established at trial that Fritz was a senior administrator with OHCA and her duties included dealing with OFMQ. She was the contract monitor for OHCA as to the behavioral health services portion of the OFMQ contract and could affect, at least in general, the overall level of units OFMQ approved. These circumstances, coupled with evidence as to disputes or disagreements between Holcomb & Fritz, are not enough to support an inference that Fritz in fact used her power or position to harm JCH, Inc.

The evidence relating to Fritz's role in the denial of accreditation to JCH, Inc. is similarly lacking.

Fritz was on the board of directors of CARF, the accrediting agency. The CARF representative testified that input from state regulators was considered in making accreditation decisions. However, there was no evidence that Fritz in fact made any recommendation as to JCH, Inc.[65] She had what Holcomb viewed as improper advance notice of JCH Inc.'s denial of accreditation. However, Holcomb testified that JCH, Inc. was required to obtain accreditation by July 1, 2001. He also indicated his conversation with Fritz, which reflected her knowledge of the denial,[66] occurred after that date, in mid-July 2001.[67] The fact that a state regulator would have that information in that sequence suggests nothing improper.

The evidence offered falls short of providing a basis upon which the jury could have reasonably concluded that Fritz intervened with CARF to deny JCH, Inc. its accreditation[68] or otherwise retaliated

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[65] Plaintiffs alluded to evidence of a telephone call the CARF reviewer made during the accreditation inspection of the JCH, Inc. facility, which left the reviewer shaken. Transcript, pp. 1164-65. Although plaintiffs suggested the call was to Fritz, nothing in the evidence supported that assumption or inference.

[66] Holcomb testified that the results were still preliminary in mid-July when he had his conversation with Fritz.

[67] Transcript, pp. 1178,1169.

[68] As to the CARF accreditation issue, it is highly questionable whether there was evidence from which the jury could have concluded Fritz had the intent or motive to harm JCH, Inc. JCH, Inc. was the only member of the provider group to be denied accreditation. All other plaintiffs, including several with far more extensive involvement in lobbying than Holcomb, were accredited by CARF. Evidence that Fritz rolled her eyes and laughed at Holcomb in a meeting two and a half years prior to (...continued)

against JCH, Inc. Fritz's motion for judgment as a matter of law on JCH Inc.'s claims, too, must be granted.

D. Defendant Brown's Rule 50 motion

The jury found in favor of defendant Brown on the claims of all individual plaintiffs except those of Mr. and Mrs. Thrift,[69] awarding them compensatory damages in the amount of $25,000 each and $500 each in punitive damages.[70] Again, the discussion with respect to the individual plaintiffs' claims against Fogarty, in particular the references to defamatory comments made about plaintiffs, applies to the claims against Brown. Most of her actions that plaintiffs objected to involved protected conduct of Brown. She, too, had First Amendment rights.[71]

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the CARF accreditation plainly does not support an inference that she retaliated against him. (January, 1999, meeting of the OHCA board, Transcript, p. 1159; JCH, Inc. closed in August, 2001, due, in part, to lack of accreditation, Transcript, p. 1156). See generally Conner v. Schmuck Markets, Inc., 121 F.3d 1390, 1395 (10th Cir. 1997) (in retaliatory discharge context, four month time lag between participation in protected activity and termination does not support an inference of causation).

[69] The Court previously granted Brown's Rule 50 motion as to the corporate plaintiffs' claims because there was no showing she had any role with respect to prior approvals through OFMQ or the reimbursements the corporations received.

[70] It is unclear from the evidence what bases the jury may have had for finding in favor of the Thrifts, but not the other plaintiffs.

[71] For example, Brown is alleged to have contacted legislators before and after the plaintiffs saw them, with the result that the legislators' attitudes toward plaintiffs changed. There was evidence she made various statements to plaintiffs urging them (...continued)

However, although a close question, the Court concludes there was sufficient evidence, viewing it in the light most favorable to the jury verdict, from which the jury could have concluded that Brown made defamatory comments about the Thrifts to legislators or others, under circumstances implying that some punishment, sanction or adverse regulatory action would imminently follow. Further, there was evidence from which the jury could have inferred that her actions were motivated by malice or ill will sufficient to justify an award of punitive damages.

SUMMARY

For the reasons set forth above, defendant Fogarty's motion for judgment as a matter of law is DENIED as to the claims of the individual plaintiffs other than Mrs. Parkhurst and Mr. Holcomb. His motion is GRANTED as to Mrs. Parkhurst, Mr. Holcomb and the claims of the corporate plaintiffs. Defendant Fritz's motion for judgment as a matter of law is GRANTED. Defendant Brown's motion is DENIED. Judgment will enter in accordance with the jury's verdict, as modified by this order.

IT IS SO ORDERED.

Dated this 23rd day of February, 2005.

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to abandon their efforts, as well as comments on a variety of issues and in various contexts.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

NO. CIV-01-0252-HE
(Consolidated Number)

ALFRED MILTON EVANS, ET AL.,

Plaintiffs,

v.

MIKE FOGARTY, ET AL.,

Defendants.

ORDER

Filed, Aug. 25, 2003

At the conclusion of the trial in this case, the jury returned a verdict in favor of all the plaintiffs and against defendants Fogarty, Fritz and Brown in their individual capacities. The cumulative total of all amounts awarded to the plaintiffs against these defendants was $33,095,000 in compensatory damages and an additional $1,350,000 in punitive damages. Following the Court's disposition of the defendants' Rule 50 motions,[1] judgment was entered

[1] Defendant Brown's Rule 50 motion was granted in part, resulting in a reduction of the jury's award as to her.

in favor of the various plaintiffs in amounts totaling $30,565,000 in compensatory damages and $1,300,000 in punitive damages.[2]

The defendants have now filed their respective motions renewing their motions for judgment as a matter of law or seeking, alternatively, a new trial, alteration or amendment of the judgment, remittitur, or other relief from the judgment. Plaintiffs have filed their combined response to the various motions.

Insofar as the defendants' motions seek entry of judgment as a matter of law, they will be **DENIED**. The parties provide no persuasive basis for altering the conclusions reached by the Court in connection with the earlier Rule 50 motions. Similarly, the Court **DENIES** any relief sought under Fed. R. Civ. P. 60, concluding the rule is inapplicable to the issues and circumstances presented here. The Court concludes, however, that the verdict returned by the jury in this case is unsupportable under the evidence and applicable law and must be set aside in its entirety. Defendants' motions for new trial will be **GRANTED**.

DISCUSSION

A jury's verdict is not to beset aside lightly. The jury's determination of the factual issues in a case is entitled to substantial deference – a deference grounded in the constitutional right to jury trial.[3] At the same time, a federal trial judge's power to set

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[2] Judgment entered July 9, 2003.

[3] U.S. Const. amend. VII.

aside a jury verdict, in a proper case, is well-established. Fed. R.Civ.P. 59. That power is properly viewed not as being contrary to the right to trial by jury but rather as an important safeguard of that right.[4] Where a trial judge believes the jury's verdict to be contrary to the weight of evidence, or that the damages awarded by the jury are excessive, or that the ends of justice otherwise require it, the verdict may be set aside and a new trial ordered. *Gasperini* v. *Center for Humanities*, 518 U.S. 415 (1996); *Holmes* v. *Wack*, 464 F.2d 86 (10th Cir. 1972).

Here, although reluctant to disturb the jury's determination and mindful of the significant additional burden to the parties from further proceedings in this court, the Court is left with the definite and firm conviction that the jury's verdict and determination is in error, is not supported by the evidence, and must be overturned.

A variety of factors enter into the Court's determination. First, as noted in the Court's July 9, 2003, order, the evidence tending to show retaliation against the plaintiffs by any of the defendants was extraordinarily thin. Reliance on circumstantial evidence is an appropriate means of proof and, in some cases, the only way to prove certain facts. Here, however, much of the evidence offered to establish retaliatory Activity by defendant Fogarty,

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[4] *Holmes* v. *Wack*, 464 F.2d 86, 88 (10th Cir. 1972) quoting with approval from *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941): "The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."

Fritz and Brown bordered on pure speculation and, in some instances, was based on little more than proof that the particular defendant was a supervisor of some activity at OHCA. An individual defendant's liability in a § 1983 action may not be based on the doctrine of respondeat superior, but must be based on that individual's personal participation in the wrongful activity.[5] While the evidence here was sufficient to raise a jury question as to the potential liability of these defendants, that evidence was far from compelling.

The sufficiency of the evidence to support the damages awarded in this case is also central to the Court's conclusion that a new trial must be ordered. The jury awarded compensatory damages to the corporate plaintiffs totaling $24,000,000 and to the individual plaintiffs totaling $9,095,000. The only basis upon which the jury could have awarded damages of that magnitude to the corporate plaintiffs was by accepting plaintiffs' arguments as to the impact of the claimed disparity in reimbursement rates. Certain of the Court's reservations about the impact of that evidence were addressed in the July 9 order and will not be repeated here. Certain other factors, related to the damages based on the "disparity" but not addressed in the prior order, are also of concern to the Court.[6]

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[5] In the case of a supervisor, liability may also be based on the supervisor's actual knowledge of and acquiescence in the constitutional violation.

[6] The Court's earlier comments addressed the sufficiency of the "disparity" evidence to show retaliation by the defendants. The Court's Rule 50 ruling did not address issues related to whether (...continued)

As the Court's instructions made clear,[7] each plaintiff had the burden of establishing not only that plaintiff's entitlement to relief but also the amount of damages that plaintiff had suffered. Here, plaintiffs made no effort to quantify the economic losses of each corporate plaintiff. Rather, plaintiffs sought to prove the economic losses of their plaintiff group and then, in closing argument, invited the jury to allocate the damages in the proportion of one fourth to Southeastern Oklahoma Family Services, one fourth to Rustling Winds, and one fourth to Morning Star, with the balance split between the other corporate plaintiffs. Transcript, pp. 1087-8. The jury obliged with precisely the split requested by counsel.[8] There was no basis in the evidence for the jury to allocate damages in that fashion between the corporate plaintiffs. The amount of damages awarded to each particular corporate plaintiff is thus without sufficient support in the evidence.

The jury's formulaic allocation of damages between each of the defendants was also troublesome. As to the recovery of each plaintiff but

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the evidence supported the particular damage determinations made by the jury.

[7] *See* Court's Instruction to the Jury, pp. 7 and 23. The Court and counsel also discussed at length, in the context of determining an appropriate verdict for, the distinct and separate determination to be made as to each plaintiff. Transcript, pp. 940-2.

[8] SOFS, Morning Star and Rustling Winds were each awarded at total of $6,000,000. The other corporate plaintiffs, JCH Inc., Serenity Springs and Diversified Family Services, were awarded $2,000,000 each.

one, the verdict allocated the damages among all of the defendants in precisely the same ratio, with Mr. Fogarty's liability set at a given level, Ms. Fritz's liability set at half of Mr. Fogarty's, and Ms. Brown's liability set at one sixth of Mr. Fogarty's. While such an approach is not conclusive proof of an improper process being used by the jury, it at least calls into question whether the jury did make the individualized determinations of liability and damages required by the Court's instructions.[9]

The sufficiency of the evidence to support the verdict in favor of the corporate plaintiffs is lacking in another respect. The appropriate measure of damages in this case was the lost profits – not lost gross revenues – of the plaintiffs due to defendants' alleged retaliatory actions. Court's Instruction to the Jury, pp. 23-4. Plaintiffs' "disparity" evidence, to the extent that it proved anything, showed the loss in gross revenues the plaintiffs arguably had from the alleged differential treatment. It plainly did *not* establish, in and of itself, the amount of plaintiffs' lost profits. It was undisputed that the reimbursement rates for particular mental health services varied based on the type of service provided. Services to which a higher reimbursement rate applied, such as individual therapy, tended to involve a greater, more intensive level of staff

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[9] Contrary to plaintiffs' suggestion, the Court does not view the liability of these defendants as being joint and several. This case does not involve the sort of concurrent violation and non-apportionable injury as would warrant the imposition of joint and several liability. *See Northington* v. *Marin*, 102 F.3d 1564 (10th Cir. 1996).

support than did the services to which a lower reimbursement rate applied. Services such as group counseling, which might be provided to a dozen or more participants at once, required less staff support to provider per unit. Using plaintiffs' "disparity" calculation as the basis for lost profits essentially asked the jury to assume that all the additional services necessary to earn the higher reimbursement amount paid to other private providers could have been provided by plaintiffs *without additional costs to them*. Such an assumption is both implausible on its face and unsupported by the evidence in this case.

In addition to the damages awarded to the corporate plaintiffs, the jury granted substantial awards to the individual plaintiffs as well, with Mr. and Mrs. Majors receiving compensatory damage awards totaling $2.0 million, Mr. and Mrs. Thrift receiving $3.0 million, Mr. and Mrs. Parkhurst receiving $2.0 million, and other individual plaintiffs receiving lesser, though still substantial, amounts."[10] The damages awarded to the individual plaintiffs, being based largely, if not exclusively, on recovery for emotional or mental anguish,[11] are plainly excessive. In making that determination, the Court has considered both whether there was substantial evidence to support the award and whether the award is "so excessive ... as to shock the judicial

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[10] The *lowest* compensatory damage award to an individual plaintiff was to Mr. Wheeler, in the amount of $295,000.

[11] See Court's Instruction to the Jury, p. 23. The abstract value of the constitutional right involved is not an element of damages. *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299 (1986).

conscience and raise an irresistible inference that passion, prejudice or another improper cause invaded the trial . . . ." *Wulf* v. *City of Wichita*, 883 F.2d 842, 874-5 (10th Cir. 1989) (quoting *Foster* v. *MCI Telecommunications Corp.*, 773 F.2d 1116, 1121 (10th Cir. 1985)). There is no mechanical formula for determining when damages are so excessive as to meet the "shock the conscience" test, but awards given in other, similar cases may be considered in making the determination. *See Wulf*, 883 F.2d at 875.

Wulf itself is particularly instructive here, as it involved a First Amendment retaliation claim asserted by a policeman against the police chief. Considering all the circumstances present in that case, as well as similar cases, the Tenth Circuit concluded an award of $250,000 for mental anguish and distress was "clearly excessive" and remanded the case for reconsideration of the damages issue with instructions that the mental distress damages *not exceed* $50,000. Relying on *Wulf*, numerous other courts have reduced or eliminated emotional distress or mental anguish recoveries, and appear to have sometimes used the *Wulf* amount of $50,000 as a guidepost. *See Hughes* v. *Regents of the Univ. of Colorado*, 967 F.Supp. 431, 438 (D.Colo. 1996) (*see also* cases cited therein at 438-39); *Powell* v. *COBE Laboratories, Inc.*, 208 F.3d 227, 2000 WL 235241 (10th Cir. March 2, 2000) (affirming trial court's reduction of damages to $50,000). The majority of the cases where this issue has arisen appear to be Title VII or other employment-related cases and thus are not directly comparable to this case – a First Amendment retaliation case involving conduct

stretching over several years and other relatively unique circumstances.[12] Nonetheless, the Court concludes that, even after taking the type of case and particular circumstances into account, the awards to the individual plaintiffs here were plainly excessive.

Defendants urge various theories as to why the jury reached the verdict that it did, including allegedly prejudicial references to controversial legislators or Health Department personnel. They also refer to the potential impact of Judge West's prior order being submitted to the jury. None of the specific grounds tendered by defendants are particularly persuasive. The references to particular legislators were relevant, given the context of the meetings which were referred to in this case.[13] The references to Health Department personnel (Mr. Van Meter or those related to him) were so oblique and limited as to make it unlikely they had any impact on the jury. As noted in the Court's July 9 order, the circumstances surrounding the admission of Judge West's order, coupled with the extraordinary steps taken by the Court on its own motion to address the potential prejudicial impact, render defendants' present reliance on the impact of the order unpersuasive. Ultimately, however, the Court concludes it is unnecessary to determine or speculate

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[12] This case is, however, similar to the cited cases in that the evidence of emotional distress was virtually all in the form of self-descriptions of stress and turmoil felt by the particular plaintiff (or his/her spouse).

[13] The Court has not exhaustively reviewed the record with this issue in mind, but does not recall a timely objection having been made to admission of testimony as to former Senator Stipe.

as to what factor or factors may have caused the jury to return the verdict that it did. For the reasons discussed above, the Court concludes the nature and amount of the verdict is sufficient to compel the conclusion that it must be overturned.

The Court has considered whether, rather than ordering a new trial, remittitur should be ordered in some amount. Such an approach is appropriate in many cases, but the Court concludes it is not appropriate here. Partly that is due to the Court's skepticism as to the propriety of a finding of liability against the defendants on the evidence presented. Partly it is due to the fact that establishing any lesser amount of damage would be purely arbitrary on the Court's part, there being no apparent basis in the evidence for setting some lesser amount of damages.

As noted above, the Court orders a new trial with considerable reluctance. Any jury verdict is entitled to substantial deference from the Court and should be set aside only where the need to do so is clear. Further, the Court understands the considerable disruption, financial toll, and other burdens on the parties that necessarily attend lengthy, hard fought litigation like that involved here. Nonetheless, a new tri it is necessary and appropriate under the circumstances of this case.

Accordingly, the Court **ORDERS** as follows:

1. Defendants' motions for new trial are **GRANTED** and the judgment entered July 9, 2003, is **VACATED**. Defendants' renewed motions for judgment as a matter of law are **DENIED**, as are

their motions insofar as they seek remittitur or other alteration or amendment of the judgment.

2. The Court will, in due course and by separate order, set this case for further settlement conference before Magistrate Judge Purcell. If the case is not resolved through that process, or otherwise by the parties, the Court will, at the appropriate time, set a further status conference for consideration of scheduling and other issues as may be necessary to prepare the case for retrial.

3. The motions of defendants Fogarty, Fritz and Brown for leave to file reply briefs [Documents 279, 280, and 276, respectively] are **STRICKEN as MOOT**. Similarly, plaintiffs' motion for award of attorneys fees [Document 265] and plaintiffs' bill of costs are **STRICKEN as MOOT**.

IT IS SO ORDERED.

Dated this 25th day August, 2003.

/s/

JOE HEATON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-01-0252-W

ALFRED MILTON EVANS, Individual, et al.,

Plaintiffs,

v.

MIKE FOGARTY, et al.,

Defendants.

ORDER

Filed, Aug. 14, 2001

Introduction:

Before the Court is the Defendants' Motion to Dismiss filed on April 4, 2001. Plaintiffs oppose the motion and filed a response on May 25, 2001. Upon review of the motion, the Court called for supplemental briefs on discrete issues. Plaintiffs filed their supplemental brief on July 23, 2001. Defendants filed a supplemental brief in their official capacities on July 23, 2001 and in their individual capacities on July 30, 2001. The Court considers all these briefs in deciding the motion to dismiss.

Background:

This case arises out of dealings between the Oklahoma Health Care Authority ("HCA") and plaintiffs Alfred Milton Evans ("Evans") and Southeastern Oklahoma Family Services ("SOFS"). Although he is employed in a consulting capacity, Evans apparently operates SOFS which provides mental health services in Southeast Oklahoma, Evans contends that as a result of his lobbying efforts on behalf of the mentally ill, the HCA retaliated against him personally and against SOFS as an entity. Evan alleges that this retaliation included unjustified delays in processing records requests, harassing audits, and termination of SOFS' Medicaid provider agreement. In response to these alleged wrongs, Evans and SOFS joined with certain SOFS patients ("patient plaintiffs") and filed this suit in January, 2001.

In early February, 2001, this Court held a hearing on a preliminary injunction motion filed by plaintiffs. After weighing the evidence before it, this Court ordered HCA to restore SOFS to the automatic reimbursement procedure that SOFS argued was essential to its continued existence. Following the granting of the preliminary injunction, plaintiffs filed a First Amended Complaint ("Complaint") in March 2001. The Complaint asserts eight causes of action: 1) violation of SOFS and Evans' First Amendment rights, 2) violation of the patients' First Amendment rights, 3) violation of SOFS and Evans' due process rights for deprivation of property, 4) violation of SOFS and Evans' due process rights for deprivation of liberty, 5) violation of the Medicaid Act's requirements of reasonable and adequate

reimbursement, 6) violation of the Medicaid Act's requirements of reasonable access and adequate quality, 7) violation of the Medicaid Act's amount, duration, and scope of services requirements, and 8) violation of 42 U. S.C. § 6009 and the Developmental Disabilities Assistance and Bill of Rights Act of 2000.

Defendants' motion to dismiss contains ten propositions; each proposition addresses one or more of the counts listed in the Complaint. Many of the issues raised by the motion to dismiss are complex and address one or more counts of the Complaint. In addition, analysis is further complicated by the fact that not all counts are asserted by all plaintiffs. In an effort to address all issues, the Court will analyze each proposition raised in defendants' motion to dismiss in turn; the appropriate counts and plaintiffs will be examined in the relevant portions of the analysis.

Legal Standard:

While not specifically stated, it appears that all of defendants' arguments are made pursuant to FED.R.Civ.P. 12(b)(6). When reviewing a Rule 12(b)(6) motion, a court must take all of the allegations in the complaint to be true, view them in the light most favorable to the plaintiffs, and draw all inferences in their favor. *Ramirez* v. *Oklahoma Department of Mental Health*, 41 F.3d 584, 586 (10th Cir. 1994). Granting dismissal under Rule 12(b)(6) is a harsh remedy and is generally disfavored. *Id.* However, if the allegations in the complaint clearly do not support a claim, that claim should be dismissed.

Analysis:

Proposition 1- Dismissal of Defendants in their Official Capacity

Defendants first argue that the case should be dismissed with respect to the defendants in their official capacities because the Eleventh Amendment bars suits, other than those for prospective injunctive relief, against state officials.

Plaintiffs have brought causes of action under 42 U. S.C. § 1983. Section 1983 does not create any substantive rights, but serves only as "a remedy for violations of rights secured by federal statutory and constitutional law." *Trujillo* v. *Grand Junction Regional Center*, 928 F.2d 973, 977 (10th Cir. 1991).

The State of Oklahoma and the HCA enjoy Eleventh Amendment sovereign immunity from suit and may not be sued under § 1983. *Kentucky* v. *Graham*, 473 U.S. 159 (1985)(holding that States may assert sovereign immunity in § 1983 actions); *see also Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989)(holding neither a state nor its officials acting in their official capacity are "persons" within the meaning of § 1983). Section 1983 was not intended to abrogate a State's Eleventh Amendment immunity. *Quern* v. *Jordan*, 440 U.S. 332 (1979). Therefore, relief cannot be had against the State of Oklahoma or the HCA under § 1983.

The only manner of obtaining relief against the HCA in this case is to sue the officers and board members of the HCA in their official capacities. Because "official-capacity actions for prospective injunctive relief are not treated as actions against

the State," Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985); *see also Ex parte Young*, 209 U.S. 123, 159-60 (1908), plaintiffs, by naming the officers and board members of the HCA in their official capacities, may be able to obtain prospective injunctive relief in this case.

Plaintiffs' argument that monetary relief may be had against state actors, in their official capacities, is unpersuasive. The cases cited by plaintiffs in making their argument are inapplicable for two reasons. First, even though monetary damages may be recovered from municipal entities, *Monell* v. *Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978), monetary damages are not available from the state. *See Kentucky* v. *Graham*, 473 U.S. 159 (1985). Therefore, the cases cited by plaintiffs allowing monetary recovery from municipalities (and school boards) are inapplicable to the present case. Second, plaintiffs misinterpret the primary case upon which they rely. Plaintiffs reliance upon *Smith* v. *Losee*, 485 F.2d 334 (10th Cir. 1973), is misplaced. In *Smith*, the court analyzed the issue of official immunity and found that certain individuals were not shielded from liability. More recent caselaw has developed the distinction between individual and official capacity defendants. It is well established that a judgment against an official in his official capacity is the same as a judgment against the public entity which he represents. *Brandon* v. *Holt*, 469 U.S. 464, 471-72 (1985). A suit against the HCA officers and board members, in their official capacities, is not a suit against the individuals, but is a suit against the state. Defendants in their individual capacities may still be liable for monetary

damages. Because the applicable caselaw clearly holds that monetary damages may not be had against official capacity defendants, the Court finds that the Complaint, to the extent it seeks monetary damages from the official capacity defendants, should be dismissed.

Proposition II- Dismissal of Counsel I, II, and IV for Failure to Allege Individual Participation

Defendants next seek to dismiss counts I, II, and IV of the Complaint for failure to assert that defendants individually participated in the alleged retaliation scheme. It is clear that a civil rights complaint must allege individual participation by the defendants. *Bennett* v. *Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976) (personal participation is an essential allegation in a § 1983 claim). Therefore, in order to state a claim, plaintiffs need to allege that HCA officers and board members individually participated in the First Amendment retaliation.

The Complaint sets forth the facts which give rise to the present suit. Plaintiffs allege with some particularity that defendants took actions to wrongfully terminate the SOFS Medicaid provider agreement, ordered harassing audits, and participated in delaying the processing of an open records request. The Court finds that when liberally construing the Complaint, as it must on a motion to dismiss, plaintiffs have asserted their causes of action with sufficient particularity. Therefore, the Court denies the motion to dismiss counts I, II, and IV for failure to assert individual participation by the defendants.

Proposition III - Dismissal based on Qualified Immunity

Defendants next assert the defense of qualified immunity for defendants Fogarty, Fritz, Mitchell, and Brown. Qualified immunity is an immunity from suit rather than a mere defense to liability. *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991). In the Tenth Circuit, plaintiffs need no longer meet a heightened pleading standard with respect to overcoming qualified immunity. *Currier* v. *Doran*, 242 F.3d 905, 916 (10th Cir. 2001). When analyzing qualified immunity in the context of a motion to dismiss, the Court must construe the allegations in the complaint and any reasonable inferences to be drawn from them, in favor of plaintiff. *Id* at 917. As a practical matter, this means the Court must assume that SOFS' Medicaid provider agreement was terminated as a result of plaintiffs' exercise of First Amendment Rights. As a preliminary matter, the Court also notes that because SOFS' relationship with the State is analogous to that of an independent contractor, SOFS may be treated like an employee for the purposes of First Amendment analysis. Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996).

When addressing qualified immunity, the Court must first assess whether the plaintiffs have asserted a violation of a constitutional right. If so, the Court must address whether the constitutional right was clearly established so that reasonable officials would have understood that their conduct violated that right. *Dill* v. *City of Edmond*, 155 F.3d 1193, 1204 (10th Cir. 1998). The Court takes each of these steps in turn.

In the context of First Amendment rights, the Court must apply the four-step analysis derived from *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), to determine whether a constitutional violation has been asserted. Pickering requires the Court to first determine whether plaintiffs' speech involved a matter of public concern. If so, the Court must balance the plaintiffs' interest in commenting upon matters against the interests of the state. If this balance tips in favor of the plaintiffs, they must then show that their speech was a substantial factor in the supposed retaliation. Finally, if plaintiffs make all these showings, defendants may demonstrate that they would have taken the same actions even in the absence of protected speech. *Dill*, 155 F.3d at 1202. The first two steps are legal questions while the last two concern causation and involve questions of fact. *Id.*

In resolving the first step, the Court must determine if plaintiffs' speech involved a matter of public concern. The Complaint asserts that plaintiffs lobbied the legislature on issues regarding the operation of the Oklahoma Medicaid system. When viewing the Complaint in the light most favorable to the plaintiffs, the Court must find that plaintiffs' speech involved a matter of public concern and that the first step of the *Pickering* test supports plaintiffs' position.

The second step of the *Pickering* test requires the Court to balance the interests of the plaintiffs' in commenting upon the Medicaid system against the state's interests. In the present case, the State does not assert that any State interest outweighed the plaintiffs' interest in free speech. Therefore, the

second step of the *Pickering* test also supports plaintiffs' position.

As stated above, the third and fourth steps of the *Pickering* test involve questions of fact. On a motion to dismiss, these must be resolved in favor of plaintiffs. Therefore, the Court finds that because, at this stage of the litigation, all of the *Pickering* factors support plaintiffs' position, plaintiffs have alleged a constitutional violation.

Having established that the plaintiffs have alleged the violation of a constitutional right, the Court must still determine whether that right was clearly established so that reasonable officials would understand their conduct violated that right. For the law to be clearly established, the Tenth Circuit has stated that there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established law from other courts must have found the law to be as the plaintiff maintains. *Medina* v. *City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992).

When the Pickering balance test is involved, the law is less likely to be clearly established than in other cases. *Dill*, 155 F.3d at 1204 (citing *Melton* v. *City of Oklahoma City*, 879 F.2d 706, 728 (10th Cir. 1989)). However, as previously stated, a court must draw all reasonable inferences in favor of the plaintiffs when deciding a motion to dismiss. Plaintiffs argue that even when the *Pickering* test is applied, the right against retaliation for exercise of First Amendment rights was clearly established at the time of defendants' actions. To support their argument, plaintiffs cite *Bisbee* v. *Bey*, 39 F.3d 1096 (10th Cir. 1994) and *Patrick* v. *Miller*, 953 F.2d 1240

(10th Cir. 1992). Both of these cases denied qualified immunity in the context of First Amendment retaliation. When taking all facts in the light most favorable to the plaintiffs, the Court finds that the law on the issue of First Amendment retaliation was clearly established. Therefore, the Court finds that, at this stage of the litigation, the Complaint may not be dismissed as to defendants Fogarty, Fritz, Mitchell and Brown based on their assertion of qualified immunity.

Proposition IV – Burford Abstention

Defendants next assert that the Court should abstain from deciding counts II, VI, VII, and VIII of the Complaint. Defendants base their argument on the case of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). In *Burford*, the Supreme Court found federal court abstention to be appropriate when dealing with complex state regulatory schemes. Defendants cite *Osteopathic Hospital Founders Association, Inc.* v. *Splinter*, 955 F.Supp. 1351 (N.D. Okla. 1996), for the proposition that federal courts should abstain in Medicaid disputes. The *Osteopathic Hospital* court chose to abstain in a dispute involving adequate reimbursement rates under the Boren Amendment, 42 U.S.C. § 1396a(a)(13).

The Court finds that *Osteopathic Hospital* is not directly applicable to the facts in this case for a number of reasons. First, the *Osteopathic Hospital* court took care to note that the dispute in that case did not involve an allegation that the State was systematically denying adequate reimbursement to Medicaid providers; the reimbursements to only one

provider were at issue. *Osteopathic Hospital*, 955 F.Supp. at 1360. Counts II, VI, VII, and VIII of the Complaint all allege systematic violations of the federal Medicaid provisions. Count II alleges a systematic denial of the patient plaintiffs' right to associate, Count VI alleges a systematic denial of the patient plaintiffs' right to reasonable access and adequate quality of care, Count VII alleges a systematic denial of patient plaintiffs' right to sufficient amount, duration and scope of services, and Count VIII alleges a systematic denial of patient plaintiffs' right to appropriate treatment, services, and habilitation. These allegations of systematic denials clearly differentiate the facts before this Court from the facts before the court in Osteopathic Hospital.

Second, it is clear that a number of federal courts have examined issues similar to the ones presented in this case. See generally *Herne* v. *Beye*, 57 F.3d 906 (10th Cir. 1995); *Smith* v. *Rasmussen*, 249 F.3d 755 (8th Cir. 2001); *Hope Medical Group for Women* v. *Edwards*, 63 F.3d 418 (5th Cir. 1995); *West Virginia University Hospitals, Inc.* v. *Casey*, 885 F.2d 11 (3rd Cir. 1989); *Evelyn V* v. *Kings County Hospital Center*, 819 F.Supp. 183 (E. D. N. Y. 1993). Because the issues presented in this case 1) appear to be distinguishable from those in Osteopathic Hospital, and 2) appear to involve an interpretation of federal law, the Court declines to dismiss counts II, VI, VII, and VIII under the *Burford* abstention doctrine.

Proposition V - Dismissal Based on Lack of Property Right

Count III of the Complaint asserts that Evans and SOFS have a property interest in the facilities operated by SOFS and in the continued receipt of Medicaid reimbursement monies. Evans and SOFS also assert that this property interest was taken without due process. Defendants contend that neither Evans nor SOFS has a constitutionally protected property interest in the continuation of the Medicaid reimbursements. To support their position, defendants cite *Geriatrics, Inc.* v. *Harris*, 640 F.2d 262 (10th Cir. 1981) and *Kelly Kare, Ltd* v. *O'Rourke*, 751 F.Supp. 1154 (S.D.N.Y. 1990). *In Geriatrics*, the Tenth Circuit held that the plaintiff nursing home did not have a protectable property interest in the continuation of its Medicaid contract. *Geriatrics*, 640 F.2d. at 265. The court found that the financial need of the nursing home was merely incidental to the purpose and design of the Medicaid program. *Id.* In *Kelly Kare*, the court held that a Medicaid provider did not have a due process property interest in continuation of its contract with the county. In analyzing the issues, the court stated that "if all public contracts were per se a property interest, the effect would be the constitutionalization of the contractual relationships of all governmental entities. No court has yet recognized such a claim of entitlement." *Kelly Kare*, 751 F.Supp. at 1156.

Plaintiffs do not address *Kelly Kare* and try to distinguish Geriatrics on its facts. The Court finds plaintiffs' arguments unpersuasive. While plaintiffs are correct in asserting that a due process property right arises when there exists more than a unilateral expectation of continued employment, *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577

(1974), the Geriatrics court found that, in the Medicaid context, there existed at most a unilateral hope that the contract would be renewed. Geriatrics, 640 F.2d at 264. The contract at issue in this case is terminable at will; therefore, the plaintiffs' attempt to distinguish *Geriatrics* based on a contract termination date is unpersuasive. The Court finds that plaintiffs Evans and SOFS have no protected property interest in the continuation of the SOFS Medicaid provider agreement; Therefore, to the extent the Complaint alleges that Evans and SOFS were denied due process with regard to their alleged property interest in the continuation of the SOFS Medicaid contract, the Complaint is dismissed.

Proposition VI - Dismissal of Claim V Regarding Violation of 42 U.S.C. § 1396a(a)(13)

Count V of the Complaint alleges that defendants violated 42 U.S.C. § 1396a(a)(13) with regard to adequate reimbursement. Plaintiffs also allege that their right to reasonable and adequate reimbursement is supported throughout the Medicaid Act. Defendants cite the current version of 42 U.S. C. § 1396a(a)(13) and argue that the statute merely requires the State to adopt a certain process by which it sets reimbursement rates. Defendants correctly argue that the Complaint does not allege that the State has not complied with the provisions of 42 U.S.C. § 1396a(a)(13). Therefore, to the extent the Complaint alleges a violation of the Medicaid Act's requirement of reasonable and adequate reimbursements based on 42 U. S. C. § 1396a(a)(13), the Complaint is dismissed. The Court takes no position on whether there are other provisions of the

Medicaid Act which provide a cause of action for failure to make adequate reimbursements to providers.

Propositions VII, VIII, and X - Dismissal of Patient Plaintiffs Medicaid and Developmental Disabilities Assistance and Bill of Rights Act Claims

In their motion to dismiss, defendants argue that counts VI, VII, and VIII should be dismissed for a variety of reasons. Plaintiffs disagree and responded to the arguments in their response. As previously noted, the Court requested all parties to submit supplemental briefs that addressed the issue of standing. The Court finds these standing arguments to be of particular relevance with respect to counts VI, VII, and VIII.

It is well settled that there are three elements to the standing requirement. First, plaintiffs must have suffered an "injury in fact" that is (a) concrete and particularized, and (b) actual and imminent. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely that the injury will be redressed by a favorable decision. *United States* v. *Hays,* 515 U.S. 737, 742-43 (1995).

In counts VI, VII, and VIII, plaintiffs assert that defendants have harmed the patient plaintiffs by 1) arbitrarily closing Texoma Mental Health Services, Inc. ("Texoma"), and 2) threatening to close SOFS. Upon review of the Complaint, it appears that the patient plaintiffs lack standing to bring counts VI, VII, and VIII.

As stated by plaintiffs, the patient plaintiffs suffered no disruption of services when the HCA decided not to renew Texoma's Medicaid provider agreement. The Complaint clearly states that "following Texoma's closing, SOFS was servicing nearly the identical population of mentally ill Medicaid recipients as Texoma." Complaint ¶ 50. Even when drawing every inference in favor of the plaintiffs, it does not appear that the patient plaintiffs suffered any injury as a result of Texoma's closure. Specifically, it does not appear that Texoma's closure caused the patient plaintiffs to 1) suffer any lack of access or lack of adequate quality of care (count VI), 2) be denied adequate amount, duration and scope of services (count VII), or 3) be denied appropriate treatment, services and habilitation for their disabilities (count VIII).

Plaintiffs filed this case in February, 2001. At that time, defendants had already suspended their previously issued notice of intent to terminate the SOFS Medicaid provider agreement. SOFS was to be put on a manual billing system designed to verify the necessary documentation. SOFS was to be reimbursed for services that it had been provided once the documentation was verified. This Court's order of February 12, 2001, required defendants to return SOFS to an automated billing procedure; this arrangement continues to this day. At all times, SOFS has been able to collect (whether by automated billing or by manual review) reimbursements that were due. SOFS is currently providing services to the patient plaintiffs.

As for defendants' actions taken with respect to SOFS, plaintiffs do not allege actual and imminent

harms. First, under count VI, plaintiffs only allege that the patient plaintiffs' rights to reasonable access to, and adequate quality of, Medicaid services has been "threatened" by defendants' actions. Second, under count VII, plaintiffs only allege that insufficient amount, duration, and scope of services "will result" should HCA decide to terminate the SOFS provider agreement. Finally, under count VIII, plaintiffs only allege that the potential termination of the SOFS provider agreement "will necessarily result" in the denial of appropriate treatment, services and habilitation to the patient plaintiffs. As previously stated, defendants have not terminated the SOFS provider agreement. In the present case the patient plaintiffs have not yet suffered any harm as a result of defendants' actions. In addition, any future harm that may be suffered is speculative; should plaintiffs prevail on their First Amendment claim, SOFS may retain its Medicaid provider agreement and continue on the automated billing procedure. In the event that the patient plaintiffs do suffer harm in the future, they may file an action at that time. Therefore, the Court finds that the patient plaintiffs lack standing to bring counts VI, VII, and VIII of the Complaint; accordingly counts VI, VII, and VIII are dismissed.

Proposition IX - Claim Regarding Patients' Right to Associate

Claim II of the Complaint asserts that defendants' actions have violated the plaintiff patients' First Amendment right to freely associate. Defendants argue that while the First Amendment does guarantee a general right to freely associate,

their actions do not infringe upon that right. Specifically, defendants argue that the patients do not associate with SOFS and Evans for traditional First Amendment reasons. From the Complaint, it appears the patients associate with Evans and SOFS purely to receive medical services. The Complaint alleges that defendants have disrupted those medical services by cutting Medicaid funding. Plaintiffs have provided no authority to suggest that the HCA's suggested termination of SOFS' Medicaid contract equates to a violation of associational freedoms. It appears that the patients are still free to associate with Evans and SOFS for any reason, medical or otherwise.

It is clear that patients have no property interest in receiving services from one particular Medicaid provider. *O'Bannon* v. *Town Court Nursing Center,* 447 U.S. 773, 785 (1980). In the absence of any authority presented by plaintiffs showing that patients have a First Amendment right to associate with a particular state-supported Medicaid provider, the Court finds the Complaint, to the extent that it alleges a violation of associational freedoms on behalf of the plaintiff patients, should be dismissed.

Remaining Standing Issues

As noted in this Court's July 13, 2001 order, there appears to be some confusion as to whether Evans and SOFS had standing to bring their claims. The parties submitted supplemental briefs in an attempt to clarify the issue; while the briefs submitted tangentially addressed the standing issue, some ambiguity remains. As previously stated, there

are three elements to the standing requirement. First, plaintiffs must have suffered an "injury in fact" that is (a) concrete and particularized, and (b) actual and imminent. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely that the injury will be redressed by a favorable decision. *Hays*, 515 U.S. at 742-43.

Plaintiffs assert that both Evans and SOFS have been retaliated against by the HCA. Specifically, plaintiffs contend that, as a result of exercising their free speech rights, the HCA retaliated against Evans individually and against SOFS. This gives rise to two questions: 1) which free speech rights did Evans and SOFS exercise, and 2) what retaliation did each plaintiff suffer?

Plaintiffs claim that Evans is, in essence, the owner and chief executive officer of SOFS. Plaintiffs' Supplemental Brief at 3. This assertion makes distinguishing between Evans acting 1) in his individual capacity, 2) as a representative of SOFS, and 3) as a representative of Texoma difficult. The Complaint is unclear which First Amendment rights Evans exercised in his individual capacity and which he exercised in his capacity as a representative. Specifically, it is unclear whether Evans undertook his 1) lobbying efforts, 2) letter writing efforts, and 3) information requests in an individual or representative capacity. The Complaint is also unclear as to whether Evans was harmed in his individual capacity. The harms cited by plaintiffs include 1) termination of the SOFS Medicaid provider agreement, 2) termination of the Texoma Medicaid provider agreement, 3) harassing audits, 4)

refusal to allow Evans to appear and be heard at public meetings, and 4) refusals to comply with Evans' open records requests. Of these harms, only the refusal to allow Evans to be heard at meetings and the refusal to comply with open records act requests could be construed as harms suffered by Evans in his individual capacity; the other harms cited clearly were suffered by the entities SOFS and Texoma. Even the refusal to allow Evans to be heard at meetings and the refusal to comply with the open records request might not have been borne by Evans in his individual capacity. If the request to be heard and the records request were made by Evans in a representative capacity, any retaliation would have been suffered by him in a representative capacity.

Unfortunately, it is unclear precisely what plaintiffs are alleging as their First Amendment retaliation causes of action. However, when the Complaint is viewed in the light most favorable to the plaintiffs, the Court must give plaintiffs the benefit of the doubt and conclude that some of Evans' actions were taken in an individual capacity and some were taken in a representative capacity. Therefore, the Court cannot at this time dismiss either Evans or SOFS' First Amendment retaliation claims for lack of standing.

Conclusion:

For the reasons stated more fully above, the Court:

1. GRANTS the motion to dismiss the Complaint against defendants in their official capacity to the extent the Complaint seeks monetary damages;

2. DENIES the motion to dismiss the Complaint for failure to allege individual participation by defendants;

3. DENIES the motion to dismiss the Complaint to the extent it seeks dismissal of defendants Fogarty, Fritz, Mitchell, and Brown of the basis of qualified immunity;

4. DENIES the motion to dismiss counts II, VI, VII, and VIII on the basis of *Burford* abstention;

5. GRANTS the motion to dismiss count III of the Complaint on the basis that neither Evans nor SOFS has a property interest in the continuation of the SOFS Medicaid provider agreement;

6. GRANTS the motion to dismiss count V of the Complaint to the extent it alleges a violation of 42 U.S.C. § 1396a(a)(13);

7. DISMISSES counts VI, VII, and VIII of the Complaint on the grounds that the patient

plaintiffs lack standing to assert these claims;

8. GRANTS the motion to dismiss count II of the Complaint on the basis that the patient plaintiffs have not asserted a First Amendment deprivation upon which relief can be granted.

ENTERED this 14th day of August, 2001.

LEE R. WEST
UNITED STATES DISTRICT JUDGE